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In The

Supreme Court of the United States

RICHARD MUNOZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the landmark case of *Strickland v. Washington*, *infra*, this Court outlined the standards which apply when a criminal defendant alleges his trial counsel rendered ineffective assistance of counsel (hereinafter "IAC"). Since then, a split has developed among the circuits regarding the standard of review appropriate when reviewing a claim of IAC. Some circuits, including the Sixth Circuit in the instant case, hold that the court of appeals reviews the claim de novo, paying "no deference" to the district court's findings of fact or rulings. Other circuits hold that the findings of fact made by the trial court must be reviewed deferentially, under the clearly erroneous standard.

1. Can a court of appeals, reviewing an IAC claim, reject the trial court's findings of fact and substitute its own factual findings under a non-deferential, de novo standard of review?

2. When reviewing an IAC claim, should the court of appeals utilize a bifurcated standard of review, reviewing the law de novo, but deferring to the trial court on issues of fact, reversing such findings when the trial court commits clear error?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Munoz respectfully prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The published decision of the Sixth Circuit, reversing the order granting a new trial by the District Court for the Eastern District of Tennessee, was filed on May 18, 2010 and is reported at 605 F.3d 359. Appendix (App.) 1-51. On August 27, 2010, the Sixth Circuit Court of Appeals denied a petition for rehearing and request for rehearing en banc. App. 77. The District Court's written decision granting Petitioner Munoz's motion for new trial was filed on March 2, 2009, but not published. App. 52-76.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the above cited judgment.

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United Sates Constitution guarantees effective assistance of counsel, stating: "In all criminal prosecutions, the accused

shall enjoy the right to . . . the Assistance of Counsel for his defense."

REASONS FOR GRANTING CERTIORARI

Since this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), a split in the circuits has developed over the proper standard of review and the place, if any, of deference to the trial court's factual findings. The Sixth Circuit and the Fourth Circuit hold that the courts of appeals owe "no deference" or "no special deference" to the lower court's findings. These circuits review rulings on IAC – both legal and factual – de novo, giving no deference to the factual findings made by the lower court.

In contrast, the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits hold that a bifurcated standard of review must be employed when a court of appeals reviews a claim of IAC: the application of the law to the facts is reviewed de novo; while the findings of fact, including credibility determinations, are reviewed under the clearly erroneous standard, paying deference to the court which presided over the hearing.

And, as noted by the Sixth Circuit panel which decided this case, the D.C. Circuit has previously employed a more lenient standard of review when the IAC claim is raised in the context of a Rule 33 motion for new trial. *Bruce v. U.S.*, 379 F.2d 113, 117 (D.C. Cir. 1967); see also *U.S. v. Thompson*, 475 F.2d 931,

932 n.3 (D.C. Cir. 1973) ("ineffective assistance light," applies when the issue arises in the context of a motion for new trial pursuant to Federal Rule of Criminal Procedure 33); and, Wright, Federal Practice & Procedure § 552 (3d ed. 2004) ("the grounds for relief are broader under [Rule 33] than under Section 2255. [Rule 33] allows a new trial whenever the interest of justice requires it, while the statutory remedy is limited to grounds that may be raised on collateral attack, and thus for the most part reaches only constitutional defects in the proceedings.").

Ensuring that the various courts of appeals confine their decisions and rulings to their proper role is, indeed, one of the primary functions of this Court. In fact, this Court is the only entity which can ensure that trial courts are granted deference in their field of expertise, i.e., fact finding, by reigning in courts of appeals that overstep their purview and invade the province of the lower courts which are powerless to enforce limits on the authority of the courts of appeals.

Many constitutional questions involved mixed questions and therefore require the "mixed" bifurcated review: de novo review of the law but review of the facts under the highly deferential clearly erroneous standard. Unfortunately, the lower courts of appeals have not all adhered to the these standards, sometimes applying de novo review to mixed questions and sometimes review for clear error. See Warner, "All Mixed Up About Mixed Questions," 7 J. App. Prac. & Process 107 (2005). In the review of IAC

claims, we see the same assortment of varied standards of review. This results in the inconsistent application of law and raises a further danger that the courts of appeals will, either consciously or subconsciously, choose a standard of review which makes it easier to reach a desired result.

The ruling of the Sixth Circuit in this case, that it "owed no deference" to the district court which presided over the criminal trial of Mr. Munoz and the hearing for new trial due to IAC resulted in the reversal of factual findings with which it simply disagreed. The Sixth Circuit thereby invaded the province of the trial court, as prohibited by this Court in *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985). In fact, this Court has repeatedly observed that the district court is better positioned to make findings of fact, including credibility determinations. *Ornelas v. U.S.*, 517 U.S. 690 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) and *Arizona v. Washington*, 434 U.S. 497, 514 (1978). Courts of appeals are required to exercise restraint when reviewing factual findings, taking care that they are not supplanting the judgment of the district court on issues of fact, even if they "disagree."

Here, the same district court had presided over the hearing on IAC ***and*** the one-day trial of Richard Munoz on charges of narcotics trafficking. The district court had observed the demeanor of Mr. Munoz when he testified and heard the testimony of the government's star witness, co-defendant Jose Tagaban. The district court observed the performance of trial

counsel first hand and was familiar with trial counsel, who has practiced in that district for many years. Then, the same district court presided over the hearing for new trial and observed the demeanor of the witnesses called to testify at that hearing. Yet the Sixth Circuit held it owed this court "no deference," repeatedly reversing the factual findings and credibility determinations made by the district court because it "disagreed."

This Court should grant certiorari not only to settle the split among the circuits and clearly establish the applicable standard of review, but also to affirm that findings of fact, credibility determinations and weight of the evidence determinations made by the trial courts are indeed granted great deference.

Under the proper standard of review, the district court's order granting a new trial based on the ineffective assistance of Mr. Munoz's trial counsel should be upheld.

STATEMENT OF FACTS

A. Procedural History.

On July 25, 2006, the government filed an indictment charging six defendants in a conspiracy to distribute methamphetamine in the Eastern District

of Tennessee. (CR 1).[1] Richard Munoz was arrested on that indictment in El Centro, California on July 27, 2006. (CR CASD, 1). He was released on bond and ordered to appear in the Eastern District of Tennessee to answer the charges. (CR CASD, 4, 6, 15).

On September 11, 2006, Mr. Munoz flew to Chattanooga, Tennessee, for arraignment. (CR 34). On that date, he was appointed counsel, Paul Bergmann. (Id.)

By October 26, 2006, all five co-defendants had noticed their intention to plead guilty and Richard Munoz was the sole defendant proceeding to trial. (CR 44, 49, 50, 52, 55).

No motions of any kind were filed on behalf of Mr. Munoz. No investigator was hired.

On November 7, 2006, Mr. Munoz appeared in Tennessee for trial. Presentation of evidence began and ended on November 7, 2006. (CR 74). On November 8, 2006, the court instructed the jury, counsel made closing arguments and, shortly thereafter, the jury returned its verdict of guilty on counts one and three. (CR 75, 77).

On November 14, 2006, Attorney Bergmann filed a two-paragraph motion for acquittal, citing no case law. (CR 61). On January 31, 2007, the district court

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[1] Cites to the Clerk's Record from the Eastern District of Tennessee are denoted "CR"; cites to the record from the Southern District of California are referenced by "CR CASD."

issued a five-page written order denying the motion for acquittal. (CR 93). The trial court found that the case boiled down to a credibility contest between the government's principal witness, cooperating co-defendant Jose Tagaban, and Richard Munoz. Because the court is "precluded from assessing credibility" when judging the sufficiency of the evidence under Federal Rule Crim. P. 29, the district court deferred to the jury's verdict and denied the motion. (CR 4).

On February 22, 2007, the court relieved Attorney Bergmann. (CR 98). On May 8, 2007, Mr. Munoz filed his motion for new trial which included a sixty-eight (68) page appendix containing affidavits from potential witnesses and affidavits outlining the post-verdict investigation. (CR 133 & 133-2). The lower court set a hearing for June 21, 2007. (CR 134).

At the hearing on June 21, 2007, Mr. Munoz called witnesses and presented additional evidence via affidavit. (CR 136, 138-9, HT 27-92).[2] The government presented no evidence and called no witnesses. (CR 136). The court set a post-hearing briefing schedule and the parties filed three additional briefs. (CR 140, 142, 145, 146).

On March 2, 2009, the district court filed its written order granting the motion for new trial. (CR 154, App. 52-76). The district court found Bergmann

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[2] The transcript of the post-trial hearing is referenced "HT".

ineffective for failing to investigate and failing to present extrinsic evidence of credibility. (Id. at 17-18).

B. Statement of Facts.

1. Facts Adduced At Trial

Richard Munoz, a forty-one year old father of two, worked for the Imperial Irrigation District (hereinafter "IID") in Southern California. (CR 89, TT 138-139).[3] When he started working there, approximately three years prior to his arrest, Tagaban was one of his superiors and trainers. (TT 70-72, 139-140). The two became "partners" at work. (TT 74, 141). Tagaban also helped Richard during a difficult divorce, loaning him $2,000.00 to hire a divorce lawyer after they discovered his wife in bed with another man. (TT 74-75, 142). Later, Tagaban invited Richard Munoz, his children, and his girlfriend to his house to watch boxing matches and for barbeques.

Aaron George and Jose Tagaban had been distributing pound quantities of methamphetamine and heroin for three or four years prior to their arrests. (TT 51, 54, 90). Tagaban had a prior conviction for possessing drugs for sale. (TT 82-83, 85). George and Tagaban both made deals with the government, agreeing to testify in exchange for sentence reductions. (TT 51, 54 & 105).

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[3] The transcripts of the trial are referenced "TT".

When shipping his drugs to Tennessee, Tagaban used others to deliver boxes of drugs to the Fed-Ex because he was afraid of getting caught. (TT at 55). The first time Tagaban asked Richard Munoz to drop off a sealed package at the Fed-Ex, he told Richard the package contained a couple of t-shirts and a coffee mug – not drugs. (TT 79, 145). Richard Munoz had also "helped" Tagaban by picking up a money gram for him. (TT 63). However, Tagaban testified that he never told Richard Munoz that this money was drug money. (TT 63, 78-79). Tagaban did not pay Richard Munoz for taking boxes to the Fed-Ex office. (TT 67, 80). Tagaban agreed that Richard Munoz was not a "drug dealer" nor a drug user, but an "honest, hard-working man." (TT 61, 69).

The point of contention was the second package that Richard Munoz dropped off at the Fed-Ex. Tagaban testified that Munoz watched as he put a bag of methamphetamine powder in the Fed-Ex box. (TT 59). Tagaban further testified that he told Richard Munoz that the white powder was methamphetamine and that, knowing this, Richard Munoz agreed to take the box to the Fed-Ex office. (TT 60-61). Another disputed factual issue concerned the parties at Tagaban's house. Tagaban and George claimed that drugs were sold and used in the garage of his house during these barbeques and that Richard Munoz witnessed a drug transaction on one occasion. (TT 65-66).

Richard Munoz admitted to taking two packages to the Fed-Ex at the request of Tagaban. However, he

did not know that either package contained drugs. (TT 145, 150-51). Richard Munoz recalled that on the second occasion, Tagaban had asked him to deliver the package at the end of the work day. (TT 150). The package was sealed and closed when Munoz first saw it. (Id.) He did not receive any payment for delivering the package, as conceded by Tagaban. (TT 150-51).

Agents Frizzell and Delaney flew to El Centro, California to interrogate Tagaban and Munoz upon their arrests. (TT 23, 115-16). They claimed that Mr. Munoz said "he knew both boxes contained drugs but he did not know that it was – or he did not know what type of drugs it was but he knew it was not marijuana." (TT 25, 118). The interrogation of Munoz lasted less than twenty minutes and was conducted after an interrogation of Tagaban which lasted approximately an hour and a half. (TT 32, 116). The agents began by informing Munoz of the nature of the investigation and the reason he was arrested. (TT 118). The interrogation was not recorded by audio or video. (TT 28). Munoz testified that he told the officers he did not know what was contained in the package. (TT 154). When the officers pressed him to "guess" what the package contained, he said "I know it wasn't marijuana." (TT 154).

2. Facts Established In The Post-Trial Hearing On IAC

Gloria Munoz, Richard Munoz's sister and a senior juvenile probation officer, testified that she

was concerned about her brother's counsel's preparation for trial and spoke with trial counsel a few times. (CR 141, HT 34-35, 38-39, 51). In fact, she offered to be a witness herself. (HT 34). Bergmann did not interview her and refused to call her as a witness. (HT 34-35). Ms. Munoz offered to locate other witnesses, but Bergmann refused to talk to the potential witnesses or subpoena them to trial. (HT 34-36). He did not even take down the names and phone numbers of the potential witnesses. (Id. at 34-36).

Ms. Munoz also spoke with Bergmann about filing a motion for change of venue. (HT 33). The first time she asked him to file the motion, he claimed to be looking into it. (HT 33). The second time, Bergmann said he had filed the motion to change venue but the judge had denied it. (HT 33, 63). Bergmann never filed a motion to change venue.

Tony Alcaraz testified at the hearing and corroborated Richard Munoz's testimony that no one was selling drugs at Tagaban's family barbeques (CR 141, HT 82).[4] Tony Alcaraz had been a good friend of Tagaban's and did ***not*** know that Tagaban was involved in drug dealing. (HT 86). Alcaraz had worked with Tagaban for fifteen years and had been to Tagaban's home on more than one occasion. (HT

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[4] Other witnesses, including Rosa Tagaban, Jose Tagaban's wife, Sophia Vasquez, Jose Tagaban's mother, and Richard Munoz's girlfriend, Gina Aguilar, provided affidavits and interviews attesting that there were no drugs being sold or used at these barbeques. (CR 133-2 at 13-14).

78-79). In addition, Mr. Alcaraz laid the foundation for the photograph of Tagaban's home – a modest three bedroom home. (HT 80-81). Given that Tagaban had worked at the IID for over sixteen years and made good money with benefits, there was nothing suspicious about him owning a three bedroom home. (HT 83-84).

The District Court took judicial notice of the fact that Bergmann hired no investigator. (CR 141, HT 98-99).

Mr. Munoz also presented an affidavit detailing the potential testimony of George McCay. (CR 139). McCay "distinctly remembers both Jose Tagaban and Richard Munoz. He met them both when he was initially held in custody at the Imperial County Jail in El Centro, California." (Id. at 1). McCay recalled "Mr. Tagaban telling him that Mr. Munoz was innocent. In fact, Mr. Tagaban told Mr. McCay that he was going to testify on behalf of Mr. Munoz and testify that Mr. Munoz had no idea what was 'going on.'" (Id. at 1-2).

The following facts were presented to the court through the appendix. (CR 133-2). Gil Caldera is a superintendent at the IID where he has worked for 22 years. (CR 133-2 at 10). He is not related to Richard Munoz. He was a supervisor for both Tagaban and Richard Munoz and is therefore familiar with both men. He opined that Richard Munoz was more credible than Tagaban. (Id. at 10-11). Rosa Tagaban, Jose Tagaban's wife, was interviewed and stated that

there were no drugs at any parties at her home. (Id. at 17-18). Gina Aguilar was Richard Munoz's girlfriend. (Id. at 12-15). She lived with Richard Munoz from January, 2006, until his arrest in July, 2006. (Id. at 13). She also attended the parties at Tagaban's residence and never saw any evidence of drugs or drug use during these parties. (Id. at 13-14). Gina Aguilar has lived in El Centro all her life and has known Richard Munoz since she was 16 or 17 years old. He has a reputation as a hard-working, honest man who is not involved in drugs. (Id. at 14).

After trial, Mr Munoz researched the prior convictions of Tagaban. (CR 133-2 at 39-68). The reports prepared for sentencing in each of Tagaban's earlier convictions reveal that Tagaban has a history and pattern of shifting blame onto others. In his 2002 domestic violence case, Tagaban accused his wife of trying to cut him with broken glass and claimed he "pushed her down" in self defense. (Id. at 58-59). In his 2002 drug arrest, when Tagaban was found in possession of 136.6 grams of methamphetamine, he claimed he was just "holding the drugs for somebody." (Id. at 43-44).

SUMMARY OF ARGUMENT

While the courts of appeals review legal issues in IAC claims de novo, findings of fact must be reviewed under the clearly erroneous standard, in accordance with this Court's ruling in *Strickland v. Washington*,

466 U.S. 668 (1986). The Sixth Circuit's holding below, that it owed "no deference" to the district court's findings, and its review of the district court's findings de novo violate the directives of this Court that the factual findings of trial courts must be reviewed deferentially for clear error. See *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (delivering a sharp rebuke to the court of appeals for substituting its own findings of fact, in violation of Fed.R.Civ.P. 52(a)).

The opinion of the Sixth Circuit below also deepens a split in the circuits over the proper standard of review in cases raising IAC claims. While the majority of circuits adhere to the standard of review announced in *Strickland,* reviewing factual findings under the highly deferential "clearly erroneous" standard, both the Sixth and the Fourth Circuits review IAC claims – in their entirety – de novo, giving "no deference" or "no special deference" to the trial court's findings. This Court should bring both the Sixth Circuit and the Fourth Circuit in line with the other circuits and direct all courts of appeals to employ a bifurcated standard of review for IAC claims, review of the application of law to the facts de novo and review of factual findings, including credibility and weight determinations, for clear error.

This bifurcated review, applied in the review of many constitutional questions, preserves the proper roles of the trial courts and courts of appeals. As this Court has observed, the trial court is better situated to make findings of fact. In *Ornelas v. U.S.*, 517 U.S.

690 (1996), this Court emphasized that "a reviewing court should take care both to review the findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Id. The importance of proximity, not only to the facts presented in the courtroom but also to background facts based on knowledge of the community and familiarity with the parties, means the trial judge is particularly well suited to make factual findings. Id. at 699. "The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts." Id.

Here, the Sixth Circuit failed to use *Strickland's* bifurcated standard of review, engaging in the same appellate fact-finding which led to this Court's decision in *Pullman*. The Sixth Circuit reversed the lower court not because its findings of fact were clearly erroneous but because it "disagreed" with the lower court's findings. In doing so, the Sixth Circuit employed an incorrect standard of review and invaded the province of the district court. Under a correct standard of review, the district court's finding of IAC and grant of a new trial should be affirmed.

ARGUMENT

I. THE STANDARD OF REVIEW WHEN ASSESSING WHETHER A DEFENDANT HAS BEEN DENIED EFFECTIVE ASSISTANCE OF COUNSEL INCLUDES A HIGHLY DEFERENTIAL REVIEW OF THE FACTUAL FINDINGS FOR CLEAR ERROR.

In *Strickland v. Washington*, 466 U.S. 668, 697 (1984), this Court held that "[a]n ineffective-assistance-of-counsel claim 'is a mixed question of law and fact for which district-court determinations are subject to de novo review." However, this Court made it patently clear that the factual findings of the district court are "subject to the ***clearly erroneous*** standard of Federal Rule of Civil Procedure 52(a). . . ." *Strickland*, at 698 (emphasis added).

A. The Majority Of Circuits Correctly Follow *Strickland* And Employ A Bifurcated Standard Of Review For Claims Of IAC.

The majority of the circuits correctly apply the standard of review as articulated by this Court in *Strickland*. Thus, the First Circuit held, in a case alleging IAC due to a conflict, "the question – whether a lawyer had an 'actual' conflict that 'adversely affected' the quality of his services – is intensely fact bound in nature. . . . For this reason, we accord the district court's underlying factual findings ***due deference***, . . . rejecting them only if they are clearly

erroneous." *Familia-Consoro v. U.S.*, 160 F.3d 761, 765 (1st Cir. 1998) (emphasis added) (noting that "several" circuits follow this approach); see also *Ruiz v. U.S.*, 339 F.3d 39, 42 (1st Cir. 2003); *Cody v. U.S.*, 249 F.3d 47, 52 (1st Cir. 2001); *Gonzalez-Soberal v. U.S.*, 244 F.3d 273, 277 (1st Cir. 2001).

Similarly, the Second Circuit, when reviewing a district court's denial of defendant's habeas corpus petition alleging IAC began by noting that it "harbor[ed] some doubts about . . . [a] factual finding" but then correctly held, "[o]ur doubts, however are not sufficient to permit us to conclude that the district court's factual determination was clearly erroneous. Our review of a district court's factual findings is ***highly deferential***. We must accept the district court's account if it is 'plausible in light of the record viewed in its entirety' and we cannot reverse simply because we would have come to a different conclusion if we had 'been sitting as the trier of fact'" *Davis v. Greiner*, 428 F.3d 81, 91 (2d Cir. 2005) (emphasis added) (upholding district court's denial of habeas petition), quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); see also *U.S. v. Gordon*, 156 F.3d 376, 379-380 (2d Cir. 1998).

In a situation similar to the present case, i.e., an IAC claim made in the context of a Rule 33 motion for new trial, the Fifth Circuit correctly held that factual findings are reviewed for clear error and can be reversed only if "after viewing the record we are 'left with the definite and firm conviction that a mistake has been committed.'" *U.S. v. Fuchs*, 467 F.3d 889,

910 (5th Cir. 2006), quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). In affirming the district court, the *Fuchs* Court repeatedly cited the factual and credibility determinations made by the district court, concluding that those findings were not "clearly erroneous." Id. at 911-912; see also *Riley v. Dretke*, 362 F.3d 302, 305 (5th Cir. 2004) (affirming trial court's denial of new trial and reviewing factual findings for clear error); *Beazley v. Johnson*, 242 F.3d 248, 255 (5th Cir. 2001); and *Boyle v. Johnson*, 93 F.3d 180, 186 (5th Cir. 1996) (holding the "presumption of correctness" applied to state court findings, is "particularly strong where, as here the habeas court was the same court that presided over the trial.").

The Ninth Circuit has also emphasized the deference owed to the district court when reviewing claims of IAC. In *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002), the Ninth Circuit correctly held, "[t]o the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies" citing, *Norris v. Risley*, 918 F.2d 828, 830 (9th Cir. 1990). Review for clear error is "'significantly deferential,' in that we must accept the district court's factual findings absent a 'definite and firm conviction that a mistake has been committed.'" Id., quoting *U.S. v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000), *cert. denied*, 532 U.S. 988 (2001); see also *Duncan v. Ornoski*, 528 F.3d 1222, 1223 (9th Cir. 2008).

Likewise, the Eleventh Circuit has held that the question whether the trial attorney's decision was

tactical or negligent is a question of fact and therefore reviewed under the highly deferential, clearly erroneous standard. *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991), citing *Bundy v. Wainwright,* 808 F.2d 1410, 1419 (11th Cir. 1987). In the related context of reviewing probable cause or reasonable suspicion to detain, the Eleventh Circuit strongly enforces the review of factual findings for clear error, holding that all facts related to the motion to suppress must be viewed "in the light most favorable to the party that prevailed before the district court" *U.S. v. Bervaldi,* 226 F.3d 1256, 1262 (11th Cir. 2000); see also *Jefferson v. Hall*, 570 F.3d 1283, 1300 (11th Cir. 2009) (applying clearly erroneous review to IAC claims).

While there is some precedent in the D.C. Circuit that an IAC claim raised in a motion for new trial is reviewed under a less stringent standard, the D.C. Circuit also holds that it "applies a highly deferential degree of scrutiny to the District Court's findings of fact" in the context of an IAC claim, reversing them only if "clearly erroneous." *U.S. v. Del Rosario,* 902 F.2d 55, 58 (D.C. Cir. 1990); see also *U.S. v. Mathis,* 503 F.3d 150, 151 (D.C. Cir. 2007) ("the district court's factual findings made in the course of judging an ineffective assistance of counsel claim may be set aside only if clearly erroneous.").

The Third, Seventh, Eighth and Tenth Circuits all similarly employ the bifurcated review dictated by *Strickland*, being careful to review findings of fact for clear error and granting the district court the deference it is due. *U.S. v. Baird*, 218 F.3d 221, 225

(3d Cir. 2000); *Varela v. U.S.*, 481 F.3d 932, 935 (7th Cir. 2007); *Hardamon v. U.S.*, 319 F.3d 943 (7th Cir. 2003); *Armstrong v. Kemna*, 590 F.3d 592 (8th Cir. 2010); *Covey v. U.S.*, 377 F.3d 903, 906 (8th Cir. 2004); *Laws v. Armontrout*, 863 F.2d 1377, 1381 (8th Cir. 1988) (en banc); *U.S. v. Rodriguez-Rivera*, 518 F.3d 1208, 1216 (10th Cir. 2008); and *Anderson v. Kansas*, 425 F.3d 853, 858 (10th Cir. 2005).

Thus, the majority of the circuits follow the standard of review clearly announced in *Strickland*. That standard of review requires the courts of appeals to defer to the district court's factual findings, reversing those findings only upon a determination that the lower court clearly erred. This standard of review does not allow the courts of appeals to substitute their judgment or to reverse simply because they "disagree."

B. The Clear Precedent Of This Court Requires The Courts Of Appeals To Employ A Highly Deferential, Clearly Erroneous Standard Of Review To Factual Findings Of The Trial Courts.

This Court has long held that a district court "[f]amiliar with the issues and litigants . . . is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard. . . ." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); see also *Arizona v. Washington*, 434 U.S. 497, 514 (1978) (holding that the trial judge

is far more conversant with factors relevant to mistrial due to prosecutorial misconduct than any reviewing court could possibly be). In *Strickland,* this Court followed this precedent holding that findings of fact made by the district courts are "subject to the ***clearly erroneous*** standard of Federal Rule of Civil Procedure 52(a). . . ." *Strickland*, at 698 (emphasis added). Rule 52(a)(6) states, "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, *and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses credibility." (Emphasis added).*

In *Ornelas v. U.S.*, 517 U.S. 690 (1996), this Court reiterated that ***factual findings*** can be overturned only if clearly erroneous, even though legal determinations, such as reasonable suspicion and probable cause, should be reviewed de novo. *Ornelas*, at 699. The *Ornelas* Court "hasten[ed] to point out that a reviewing court should take care both to review the findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Id. This Court recognized the importance of proximity not only to the facts presented in the courtroom but also to background facts based on knowledge of the community and familiarity with the parties. Id. at 699. "The background facts, though

rarely the subject of explicit findings, inform the judge's assessment of the historical facts." Id.[5]

Following *Ornelas*, this Court has often cited to the trial court's superior position to make credibility determinations, findings of fact, and findings of historical facts. See, e.g., *U.S. v. Arvizu,* 534 U.S. 266, 277 (2002) (chastising the court of appeals for "casually" rejecting facts found by the district court, noting the "district Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom.") and *Uttecht v. Brown,* 551 U.S. 1, 7-9 (2007) (holding that deference is owed to trial courts when determining whether a potential juror's removal would violate the defendant's rights since the district court is in a superior position to assess demeanor and attitude).

When "there are two permissible views of the evidence, the [district court's] choice between them

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[5] See also *Koon v. United States*, 518 U.S. 81, 99 (1996) ("[d]istrict courts have an institutional advantage over appellate courts" because they "must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing."); *U.S. v. Booker*, 543 U.S. 220, 262 (2005) (replacing the de novo standard implemented by Congress with a highly deferential abuse-of-discretion standard requiring appellate courts to "give due regard to the opportunity of the district court to judge the credibility of the witnesses," to "accept the findings of fact of the district court unless they are clearly erroneous," and to "give due deference to the district court's application of the guidelines to the facts").

cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Only the trial court can observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Id. at 575. Therefore, a court of appeals should not reverse a factual finding simply because it would have found differently had it been the trial court. Id. at 573-74.

The deference owed to trial courts is not based solely on the judge's proximity to and witness of the evidence. As the Court explained in *Anderson*,

> [t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Id. at 574-75; see also *U.S. v. Stevenson*, 396 F.3d 538, 543 (5th Cir. 2005).

"[D]eferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)); see also *Thompson v. Keohane*, 516 U.S. 99, 114 (1995); *Patton v. Yount*, 467 U.S. 1025, 1028 (1984) (courts of appeals should defer to the trial judge on issues regarding juror impartiality); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (same as to capital juror's impartiality); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam) (same as to finding on a defendant's competency to stand trial); and *Oregon v. Kennedy*, 456 U.S. 667, 677 n.7 (1982) (same as to findings of prosecutor's intent in provoking a defendant to move for a mistrial).

In the context of a motion for new trial due to IAC, the district court is "better positioned" warranting the "highly deferential" review. See *Allied Chemical Corporation et al. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (holding "[t]he authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court" and reversing the court of appeals' issuance of a writ of mandamus reversing the trial court). A district court "may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon." *Pierce v. Underwood,* 487 U.S. 552, 560 (1988) (holding abuse of discretion standard

of review appropriate in attorney's fees cases). Also relevant here is the district court's special knowledge about "the local bar's litigation practices." Id.

The district court in the present case presided over the trial and observed the performance of the trial attorney first hand. The same court presided over the cases of all the co-defendants. The judge's knowledge of the case, the facts, and the historical background went far beyond what was contained within the order or even the record on appeal. The trial court was also familiar with "the local bar's litigation practices" and the performance of Mr. Munoz's trial counsel. See *Pierce, supra.* Under all the precedent from this Court, the district court in the present case was "better positioned" to make the findings of fact and the Sixth Circuit had no authority to reverse those findings absent clear error.

C. The Fourth And Sixth Circuits Employ An Incorrect Standard Of Review For IAC Claims.

The Fourth Circuit joins the Sixth Circuit in erroneously holding that "[i]neffective assistance claims involve mixed questions of law and fact, and therefore we owe 'no special deference' to the district court's findings with respect to such claims." *U.S. v. DeTemple,* 162 F.3d 279 (4th Cir. 1998), quoting *Matthews v. Evatt,* 105 F.3d 907, 919 (4th Cir.), *cert. denied,* 522 U.S. 833 (1997) (using the same "no special deference" standard when referring to the

district court's findings); *U.S. v. Munoz,* 605 F.3d 359, 366-367 (6th Cir. 2010) (holding the court of appeals reviews the claim of IAC de novo and owes "no deference" to the trial court's findings).

These cases stand in direct conflict with the majority of circuits and this Court's precedent. This Court has never endorsed a review of IAC claims that pays "no deference" or "no special deference" to the trial court. On the contrary, this Court has scrupulously required the courts of appeals to defer to the district courts when, as here, the district courts are "better positioned" to resolve the issues.

II. THE SIXTH CIRCUIT PANEL ERRONEOUSLY REJECTED THE FINDINGS OF THE DISTRICT COURT BECAUSE IT "DISAGREED."

The Sixth Circuit's actual review of the district court's factual findings demonstrates the damage done by the non-deferential de novo review of factual findings. The Sixth Circuit went so far as to reach outside the record in search of evidence to prop up Bergmann, recited "facts" not in the record, and, in one instance distorted the record by failing to include the entire quote. The lower court repeatedly reversed the district court's findings not because they were clearly erroneous but because it "disagreed" with the findings.

A. Failure To Investigate

The Sixth Circuit reversed the district court's finding that Mr. Munoz's trial counsel failed to investigate the case, substituting its own finding that "Bergmann *did* locate and call a character witness, and an ideal one, at that – Fregoso, a law-enforcement officer who had been Munoz's neighbor for over 20 years." App. 39-40. First, there was absolutely no evidence that Bergmann "found" Fregoso.[6] Fregoso, the brother-in-law of Richard Munoz, was never subpoenaed and flew out to Tennessee on his own dime. (CR 136, HT 51; CR 133 at 10). Bergmann did not "find" Fregoso – Fregoso was foisted upon a reluctant Bergmann who finally acquiesced to the insistence of the family that ***someone*** testify on behalf of Richard Munoz.

Moreover, calling one witness does not a competent lawyer make. This Court so held in the recent case of *Porter v. McCollum*, ___ U.S. ___, 130 S.Ct. 447 (2009). There the defense called one mitigation witness, the defendant's ex-wife, and read an excerpt from a deposition. Id. at 449. There, this Court reversed the court of appeals and upheld the district court's grant of petitioner's writ of habeas corpus for

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[6] To the extent the court of appeals was misled by the government's recitation of the facts, this demonstrated what mischief de novo review of factual findings can cause. Factual findings should be reviewed for clear error precisely so a court of appeals is not swayed by a persuasive piece of prose.

IAC based on counsel's failure to conduct a thorough investigation into petitioner's background.

This Court's most recent cases on IAC have reaffirmed the importance of investigation and the likelihood that deficient investigation will result in deficient performance of counsel. *Sears v. Upton*, ___ U.S. ___, 130 S.Ct. 3259, 3266 (2010) ("We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."); *Porter, supra,* at 452 ("It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of defendant's background.'").

It is here, that the Sixth Circuit reaches out beyond the record, researches Bergmann's standing on the website for the Board of Professional Responsibility and refers to Bergmann as "a long term member of the local bar." App. 43. The court of appeals failed to discover, however, that Bergmann has previously been held ineffective by the Court of Criminal Appeals of Tennessee in a death penalty case. App. 79-91; *McCormick v. Tennessee*, 2004 WL 2583903 (Tenn.Crim.App. 2004) (affirming trial court's finding of IAC for both Bergmann and attorney Rodney Strong).[7] In *McCormick v. Tennessee*, the

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[7] It is chilling to read this opinion and see that the Tennessee trial court and court of appeals found that Bergmann was

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defense attorneys (Bergmann and Strong) called the mother of the defendant (App. 83) but were nevertheless held ineffective for failing to interview the long list of witnesses offered by the defendant and failing to investigate the case. App. 86-87.

The facts in the record support the district court's finding, showing that Bergmann behaved in this case similarly to how he behaved in *McCormick, supra*. He never interviewed a single witness. (CR 141, HT 34-35, 38-39, 51). Gloria Munoz, Richard Munoz's sister, offered to locate witnesses to be interviewed, but Bergmann refused to talk to the potential witnesses or subpoena them to trial. (HT 34-36). He did not even take down the names and phone numbers of the potential witnesses. (HT 34-36). Bergmann even told Ms. Munoz the government would not pay for the witnesses to travel from San Diego, California to Tennessee. (HT 36). The Sixth Circuit's claim that somehow Bergmann found Fregoso through his amazing transcontinental investigation (without the assistance of an investigator) ***and*** hid it from Gloria Munoz, Richard Munoz's sister, the guarantor on his bond, and the person with whom he lived while on bond, is simply untenable.

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ineffective for failing to ***investigate***, the very deficiency here. As in the instant case, Bergmann "did not petition the court for state funds to compensate an investigator or for expert services;" he did not interview the witnesses offered by the defense; and, he did little more than call one family member as a witness. App. 79-91.

B. Credibility Contest And The Need For Character Witnesses

The Sixth Circuit also scoffed at the suggestion that additional character evidence would have been critical to Mr. Munoz's case. App. 40-42. First, the district court did not find the failure to call character witnesses *alone* constituted IAC. Rather, the district court concluded that "any extrinsic evidence regarding the relative credibility of Messrs. Tagaban and Munoz" would have been critical. App. 73-74, citing *Michelson v. U.S.*, 335 U.S. 469, 476 (1948) and *U.S. v. Cylkouski*, 556 F.2d 799, 802 (6th Cir. 1977). Moreover, the decision to forego additional character evidence can give rise to an ineffective assistance claim if it is not based on a reasoned tactical judgment. *Stanley v. Zant,* 697 F.2d 955, 966 (11th Cir. 1983).

In the post-conviction proceedings, Mr. Munoz presented not only witnesses who would have corroborated his testimony, but also witness testimony and evidence that would have impeached Tagaban, going to the heart of the credibility contest. (CR 133-2).[8]

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[8] The district court had before it and considered other affidavits and evidence upon which the panel did comment. Gil Caldera, a supervisor for both Tagaban and Richard Munoz, would choose Richard Munoz as more credible than Tagaban. (CR 133-2 at 10). Rosa Tagaban, Luis Tagaban's wife, was interviewed and stated that there were no drugs at any parties at her home. (Id. at 17-18). Gina Aguilar, Richard Munoz's girlfriend, attended the parties at Tagaban's residence and never

(Continued on following page)

The Sixth Circuit, however, "disagreed" with the district court's finding that the case was a "one-on-one credibility showdown between Tagaban and Munoz." App. 41. The Sixth Circuit chided the district court, saying it was not "free to discount Delaney and Frizzell's testimony altogether based upon the mere possibility that a misunderstanding had occurred." App. 41. However, whether Mr. Munoz was credible; whether his explanation was compelling; whether the agents' testimony was weighty; and whether Mr. Munoz's testimony outweighed the testimony of the agents' are factual determinations which should only be overturned if "clearly erroneous." Moreover, the district court observed that to the extent Frizzell and Delaney's testimony impeached Mr. Munoz, it made additional "extrinsic evidence" of credibility all the more important. App. 74, n.5.

Nor did Bergmann's examination of Tagaban obviate the need for character witnesses, as the circuit court claims. App. 42. Bergmann's cross-examination of Tagaban, which "successfully elicited" that Mr. Munoz was "an honest, hard-working man," (App. 42), bolstered *Tagaban's* credibility – not Mr. Munoz's. The prosecutor who tried the case actually

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saw any evidence of drugs or drug use during these parties. (Id. at 13-14). None of these witnesses were interviewed by attorney Bergmann. When the district court referred to the evidence in the record of potential witnesses, that reference includes all this evidence. See App. 68.

made this observation at Tagaban's sentencing: "I think if the Court will recall cross-examination by the defense counsel in that case, Mr. Tagaban agreed with a lot of what Mr. Bergmann put to him. And I think that really enhanced his [Tagaban's] credibility with the jury on the important questions." (CR 172, Tr. of Tagaban's Sentencing, 7-8). The court of appeals is not in a position to make a finding of fact contrary to the district court's findings and the admissions of the prosecutor.

The court of appeals also found (contrary to the district court) that government witness George's testimony was both credible and weighty. George claimed that he had "repeatedly paid Tagaban large amounts of cash for drugs 'plain as day' in Munoz's presence" and that he attended barbeques at Tagaban's house where Tagaban sold and used drugs "in plain view." App. 41. Mr. Munoz denied this. The trial judge did not view George's testimony as critical. However, if George's testimony was critical then Mr. Munoz's witnesses, Tony Alcaraz, Gina Aguilar, Rosa Tagaban and Sophia Vasquez, who all denied the presence of drugs at these parties, were all the more critical. (CR 133-2 at 9-10). These witnesses would have impeached George and thereby supported Mr. Munoz's argument that George, like Tagaban, was willing to say whatever the government wanted him to say to get a reduction in his sentence. The Sixth Circuit completely ignored these defense witnesses during its "de novo" review.

C. Failure To Move For A Change Of Venue

Here the Sixth Circuit again "disagrees" with the district court's finding, stating, "[w]e disagree that Bergmann's failure to move for a change of venue on the eve of trial was necessarily deficient performance" speculating that there may have been a strategic reason for not making the motion. App. 43. However, the district court did not find that the failure to move for change of venue, in isolation, was deficient performance. Rather, the trial court held that the failure to ***either*** move for a continuance, hire an investigator and interview possible witnesses 2000 miles away, ***or*** to move for a change of venue, was ineffective. App. 70. As the trial court noted, Mr. Bergmann did nothing: he did not hire an investigator; he did not interview witnesses; he did not investigate Tagaban; he filed no motions; and he did not seek to change venue. App. 70.

D. Failure To Adequately Cross-Examine Tagaban

The Sixth Circuit also rejected Mr. Munoz's contention that Bergmann failed to adequately cross-examine Tagaban. Here, the court of appeals distorted the record. The lower court deleted the critical portion of Tagaban's testimony from its quote in the published opinion. App. 45-47. The passage, with the omitted section highlighted, is:

> Q. . . . What you said to them that day, before you ever had a plea agreement with

the government, was that pretty much what you said here today?

A. No, sir.

Q. Well. What was different about it?

A. I didn't tell them – I didn't tell them anything about Mr. Munoz.

Q. You didn't? Are you sure about that?

A. Well, I told them what he had done, but I didn't go into any specific detail.

(TT 87; Cf. App. 45-46). The "detail" that Tagaban failed to discuss during his post-arrest statement was the gravamen of the case, i.e., whether Richard Munoz knew what was inside the Fed Ex packages. It would not take a "shrewd cross-examiner" to clue into the fact that the government's star witness had just admitted to making a prior inconsistent statement on the main issue in the case. (Cf. App. 47). This is the stuff of law school trial practice class. Moreover, the statement that Tagaban made post-arrest, prior to his plea agreement, was entirely consistent with Richard Munoz's innocence and inconsistent with Tagaban's trial testimony. Yet Bergmann failed to cross-examine Tagaban on either the post-arrest statement or the inconsistency at trial. This was deficient performance.

E. The McCay Affidavit

Mr. Munoz also presented the affidavit of George McCay, who met both Tagaban and Munoz "when he

was initially held in custody at the Imperial County Jail in El Centro, California." (CR 139). McCay recalled Mr. Tagaban telling him that Mr. Munoz was innocent. "In fact, Mr. Tagaban told Mr. McCay that he was going to testify on behalf of Mr. Munoz and testify that Mr. Munoz had no idea what was 'going on.'" (Id. at 1-2).

The Sixth Circuit speculates that "[i]t is equally plausible that Bergmann knew of McCay but felt that placing an incarcerated *drug importer* on the stand to testify on Munoz's behalf in a *drug trial* would associate Munoz with drugs in the minds of the jury, and that this would hurt Munoz more than McCay's testimony would help him." App. 50. Again, there is not one shred of evidence that Mr. Bergmann performed any investigation, much less that he found and interviewed McCay. As the Fifth Circuit so aptly put it: "an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results." *Soffar v. Dretke*, 368 F.3d 441, 474-477 (5th Cir. 2004). Moreover, whether a decision was a tactical one is a question of fact and therefore within the province of the district court. *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991) and *Bundy v. Wainwright,* 808 F.2d 1410, 1419 (11th Cir. 1987).

None of the district court's findings were clearly erroneous. The district court found that the case boiled down to a credibility contest between Tagaban and Munoz. This finding is supported by the prosecutor's comments at Tagaban's sentencing discussing Tagaban's credibility and the importance of his

testimony. The district court found that additional extrinsic evidence of Mr. Munoz's credibility or Tagaban's lack of credibility would have been critical in the case. The court of appeals had no basis and no authority to reverse these findings. These findings were made by the court in the best position to make such determinations.

When viewed against this background of facts, Bergmann's failure to 1) investigate the case; 2) interview the witnesses offered by Richard Munoz; 3) hire an investigator in the Southern District of California; 4) investigate the background of Tagaban; 5) move for a change of venue or for a continuance; and 6) cross-examine Tagaban on his prior inconsistent statement, constituted IAC, as found by the district court.

CONCLUSION

There is currently a split among the circuits on the proper standard when reviewing a lower court's findings and rulings on a claim of IAC. The Sixth and Fourth Circuits both hold that the court of appeals owes no deference to the trial court. The other circuits hold that findings of fact are reviewed under a clearly erroneous standard with a healthy dose of deference to the trial court which is better positioned to make such findings. This bifurcated review (de novo review of the application of the law and clearly erroneous review of findings of fact) is indeed the standard prescribed by this Court in *Strickland* and *Ornelas*.

To ensure uniformity among the circuits on this critical constitutional issue, this Court should grant certiorari.

Moreover, application of the proper standard to the facts of this case and the facts as found by the district court below results in an affirmance of the district court's order for a new trial. This Court should grant certiorari, review the district court's order and reinstate the grant of a new trial. Such a result will ensure that Richard Munoz receives a constitutionally fair trial as he faces charges on a ten-year minimum mandatory drug charge.

Respectfully submitted,

MARTHA M. HALL
Attorney for Petitioner Munoz

RECOMMENDED FOR
FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* *v.* RICHARD MUNOZ, *Defendant-Appellee.*	No. 09-5357

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester.
No. 06-00023-002 –
Harry S. Mattice, Jr., District Judge.

Argued: March 2, 2010

Decided and Filed: May 18, 2010

Before: BOGGS and NORRIS, Circuit Judges;
ADAMS, District Judge.*

COUNSEL

ARGUED: Perry H. Piper, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellant. Martha M. Hall, LAW OFFICES OF

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* The Honorable John R. Adams, United States District Judge for the Northern District of Ohio, sitting by designation.

MARTHA M. HALL, San Diego, California, for Appellee. **ON BRIEF:** Scott A. Winne, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellant. Martha M. Hall, LAW OFFICES OF MARTHA M. HALL, San Diego, California, for Appellee.

OPINION

BOGGS, Circuit Judge. This case reaches us in an unusual posture: the *government* appeals the district court's *grant* of a new trial under Federal Rule of Criminal Procedure 33. In the underlying trial, defendant Richard Munoz was found guilty of conspiracy to distribute methamphetamine and aiding and abetting distribution of methamphetamine. Approximately two months after the verdict, but before sentencing, Munoz obtained new counsel. Thereafter, Munoz belatedly moved for a new trial, arguing that trial counsel had provided constitutionally ineffective assistance. After an evidentiary hearing, the district court granted the motion, specifically grounding its new-trial grant on the violation of Munoz's Sixth Amendment right to effective assistance of counsel.

We hold that the district court did not abuse its discretion in determining that Munoz's untimely filing of his Rule 33 motion was the result of excusable neglect. However, because we find that trial

counsel's assistance more than met the minimum standard required by the Sixth Amendment, we reverse the district court's grant of a new trial. We leave for another day the question, addressed neither by the district court nor the parties on appeal, whether a district court may grant a new trial based on lackluster representation that does not fall below the constitutionally required standard.

I. BACKGROUND

A. Pre-Trial Events

In July 2006, Carol Ann O'Neal was arrested for selling methamphetamine to an undercover officer in Warren County, Tennessee. O'Neal cooperated with the authorities and led them to her supplier, Aaron George, a resident of Arizona. By this time, the Tennessee Bureau of Investigation ("TBI") had taken control of the developing case. George, in turn, agreed to cooperate and identified *his* source, Jose Luis Tagaban, who lived in Imperial, California.

With TBI agents listening in, George called Tagaban and arranged for a methamphetamine shipment to McMinnville, Tennessee. Tagaban told George to wire $2,000 to Richard Munoz in El Centro, California. On July 17, 2006, TBI agents did so. The next day, Munoz picked up the money order. On July 20, 2006, a federal Drug Enforcement Administration agent photographed Munoz leaving a FedEx office in Imperial, California. The following day, a FedEx package containing approximately 586 grams

of methamphetamine arrived at the McMinnville address George had provided Tagaban.

On July 25, 2006, federal drug charges were filed in the Eastern District of Tennessee against O'Neal, George, Tagaban, Munoz, and two others. Two days later, Tagaban and Munoz were arrested in Imperial, California. Both men waived their *Miranda* rights and were immediately interviewed by TBI agents Mark Delaney and Heath Frizzell. Paul Bergmann was assigned to Munoz as trial counsel. At some point thereafter, all defendants except Munoz agreed to plead guilty and cooperate with the government. The last of Munoz's co-defendants to plead guilty, George, did so on October 26, 2006 – twelve days before trial.

B. Munoz's Trial

1. *Delaney and Frizzell*

At trial, TBI agents Delaney and Frizzell testified that during their post-arrest interview with Munoz on July 27, 2006, he had admitted knowingly shipping drugs via FedEx at Tagaban's request. According to Frizzell, at that interview, Munoz had "stated that he knew there was drugs inside of the packages [he had shipped for Tagaban,] but he knew that it wasn't marijuana." Similarly, Delaney testified that Munoz had admitted "that he knew both boxes contained drugs but he did not know . . . what type of drugs," although "he knew it was not marijuana."

2. *Tagaban*

Tagaban testified that he had caused methamphetamine to be shipped to George in McMinnville, Tennessee on numerous occasions. Tagaban always shipped the drugs via FedEx, generally using a carrier named Jeffery Jimenez to take the packages to the FedEx depot. On two occasions, however, Jimenez was unavailable, and Tagaban instead used Munoz, who was both his personal friend and his co-worker at the Imperial Irrigation District, where the two men made their rounds together in the same truck.

On the first such occasion, in March or April 2006, while Tagaban and Munoz were on the job, Tagaban handed Munoz a sealed package already prepared for shipment, telling Munoz that it contained "a couple of t-shirts and a coffee mug." However, on the second occasion – the July 2006 transaction which gave rise to the charges at issue – Tagaban prepared the shipment while Munoz watched. In Munoz's presence, Tagaban placed a clear plastic bag containing white powder in the box; when Munoz asked what the powder was, Tagaban told him it was "meth." Tagaban asked Munoz to take the box to FedEx, and Munoz agreed to do so. Tagaban never paid Munoz for his assistance.

Tagaban also testified that he would occasionally hold parties at his house attended by his drug-dealer friends, as well as by Munoz. According to Tagaban, at one of these parties, about two months prior to his and Munoz's arrest, Tagaban "did a [drug]

transaction right there in front of [Munoz]," selling two ounces of methamphetamine to a man named Jeffrey Dalente while Munoz looked on. Accordingly, Tagaban was "pretty sure [Munoz] had to know" Tagaban "[was] a drug dealer."

3. *George*

George testified that he had received drugs on many occasions from Tagaban, and that he would often pay Tagaban in person while Tagaban was on the job at the Imperial Irrigation District. George would hand Tagaban between $8,000 and $20,000 in cash, "plain as day," while Tagaban was in his Irrigation District truck. On some of those occasions, Tagaban would provide George with drugs. According to George, Munoz was "almost always" present in the passenger seat of the truck during these transactions.

George also testified that he attended some of Tagaban's parties, that he saw Munoz there, and that drugs were in use at the parties, but did not testify one way or the other as to whether Munoz saw the drugs or as to any drug transactions at the parties.

4. *Munoz*

Munoz contradicted much of the above testimony. He acknowledged that he was Tagaban's friend and coworker at the Imperial Irrigation District, and he admitted having retrieved the money order wired by the TBI agents at Tagaban's request. However,

Munoz claimed that Tagaban had told him that the money order was from "a friend in Tennessee that owed [Tagaban] some money" and that Tagaban would be using the money to pay a bail bondsman who had posted Tagaban's bail for an unrelated arrest. Munoz also testified that while he had twice taken packages to FedEx for Tagaban, he did not know on *either* occasion that the package contained drugs; both times, the package had already been sealed when Tagaban handed it to him.

With respect to the second package, Munoz testified on direct examination:

> Q. All right. Did [Tagaban] reassure you that it was okay, that he was just mailing things to friends?
>
> A. Yes. I think . . . Mr. Tagaban . . . told me, "Don't worry about it, bro. I'm not going to put you – " He said, "Everything's fine."

The government cross-examined Munoz on this particular point as follows:

> Q. And [Tagaban] . . . said to you, on the second package, "Don't worry. Everything's fine. Don't worry about it." You agree with . . . that, too?
>
> A. Yes. He – Yes.
>
> * * *
>
> Q. So on that second package, he had some reason to tell you, "Don't worry about it. Everything's fine[?]"

A. I guess. I guess he did.

Q. Did you suspect that everything was not okay?

A. No. I had no reason to distrust him, no.

Q. Did you express some hesitation about sending a Fed Ex package that would cause him to say that to you?

A. No. What it was, it was that it was – I said it like a joke. I turned around, and I just said, "What, am I going to be a personal mailman?" since he had – this was the second time he had asked me.

Q. Okay. So it was a joke for you?

A. No, I was just joking around with him at the time. And he said – that's when he said that, "Come on, bro." He goes, "Just send this package for me." He goes – he goes, "I won't put you – " He said, "Everything – " He said, "I won't put you in a bind," or "I wouldn't put you – " basically, yeah, "I wouldn't put you in a bind."

With respect to his post-arrest interview with Delaney and Frizzell, Munoz testified:

A. At the end of the interview, Officer Frizzell . . . asked me, . . . "You knew that there was drugs in the box." He goes, "What was in the box?" And I said, "I don't know." And he goes, "Well – " he basically said, kind of like, "Take a guess." And I said, "I don't know." And he goes – I said, "I know it wasn't

> marijuana." And he stated, "Because of the smell?" And I said, "Well, I think if it was marijuana, it wouldn't – I think it was something bigger, because I'm here." And I believe there was something bigger in the box. And he asked, "Well, what do you think?" And I said, "I don't know. I think it was cocaine." That's what I said.
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> * * *
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> Q. Did you really know what was in the box, either box?
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> A. No. No, I didn't.

Munoz testified that he had visited Tagaban's house several times to watch pay-per-view boxing, but that he had not attended any "parties." The extent of the activities at those gatherings was Munoz, Tagaban, Tagaban's family and "maybe one or two people from work" sitting in front of the television watching the fights. Munoz denied having seen any drugs on those occasions.

5. *Fregoso*

Robert Fregoso, a California law-enforcement officer who had been Munoz's neighbor for over 20 years, testified as a character witness for Munoz. According to Fregoso, Munoz's reputation for truthfulness in the community was "[v]ery good."

6. *Verdict*

On November 8, 2006, the jury found Munoz guilty of conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846, and aiding and abetting the distribution of 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1).

C. Post-Trial Developments

On November 14, 2006, Bergmann filed a motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, which the district court denied on January 31, 2007, finding that there had been "extensive contradictory testimony" on both sides of the issue of Munoz's knowledge.

Meanwhile, on January 4, 2007, Bergmann moved to withdraw as counsel, and on February 13, Munoz's current counsel, Martha Hall, filed a notice of appearance. On February 22, 2007, the district court granted Bergmann's motion to withdraw and authorized Hall to appear in Bergmann's stead. Five days later, on February 27, Hall filed a motion to continue sentencing, in which she requested leave to file an untimely Rule 33 motion for a new trial.

The next day, the district court granted Hall's request to continue sentencing, but denied Hall's request for leave to file an untimely Rule 33 motion, as Hall had "not presented any information from which the Court could conclude that the failure to

timely file the motion for new trial was the result of excusable neglect. . . ." The district court's denial, however, was without prejudice to Hall's submission of such a motion for the court's consideration and "address[ing] the issue of excusable neglect therein. . . ."

On May 8, 2007 – six months after the verdict, and about ten weeks after Hall's appearance – Hall filed an untimely Rule 33 motion which addressed the issue of excusable neglect. As for the motion's merits, Hall argued that Bergmann had provided constitutionally ineffective assistance of counsel.[1] On June 21, 2007, the district court held an evidentiary hearing. There, Munoz's sister testified that, among other things, she had contacted Bergmann and volunteered to testify as a character witness at Munoz's trial or to put Bergmann in touch with other potential character witnesses, but Bergmann had summarily rejected her offer. Bergmann was present at the evidentiary hearing, and Hall initially indicated that she intended to put him on the stand. However, after the government pointed out that calling Bergmann to

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[1] Hall's motion also asserted that newly discovered evidence warranted a new trial. However, the district court did not address that claim, noting that "[a]s the parties' respective arguments . . . evolved and [became] refined in the course of the briefing, Mr. Munoz ha[d] conceded that his stronger argument [was] . . . ineffective assistance of counsel." *See United States v. Munoz*, No. 4:06-cr-23-2, 2009 WL 529859, at *3 (E.D. Tenn. Mar. 2, 2009). The parties do not raise the newly-discovered-evidence issue on appeal; accordingly, we do not consider it.

testify might waive the attorney-client privilege between Munoz and Bergmann, Hall elected not to do so. After an off-the-record discussion, both parties stipulated that Bergmann did not hire a professional investigator as part of his trial preparation.

On March 2, 2009, the district court granted Munoz's Rule 33 motion, set aside the jury's verdict, and ordered a new trial, holding that Bergmann had provided constitutionally ineffective assistance of counsel. *See United States v. Munoz,* No. 4:06-cr-23-2, 2009 WL 529859 (E.D. Tenn. Mar. 2, 2009). The government timely appealed.

II. STANDARD OF REVIEW

We review a district court's decision to grant or deny a Rule 33 motion for abuse of discretion. *United States v. Carson,* 560 F.3d 566, 585 (6th Cir. 2009). We also review a district court's determination that a late filing was the result of "excusable neglect" for abuse of discretion. *Nafziger v. McDermott Int'l, Inc.,* 467 F.3d 514, 522 (6th Cir. 2006). Abuse of discretion occurs when a district court "relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *United States v. Washington,* 584 F.3d 693, 695 (6th Cir. 2009).

An ineffective-assistance-of-counsel claim "is a mixed question of law and fact, for which district-court determinations are subject to de novo review." *Railey v. Webb,* 540 F.3d 393, 415 (6th Cir. 2008) (internal quotation marks omitted); *see also Strickland*

v. Washington, 466 U.S. 668, 697 (1984). It is of no consequence that the ineffective-assistance claim in this case is presented in the atypical context of an overarching new-trial-motion determination, which, as we have stated, is reviewed for abuse of discretion. This is because mixed questions of law and fact involve the *application of law* to fact, *Ornelas v. United States,* 517 U.S. 690, 696 (1996), and an "improper [] appli[cation of] the law" constitutes an abuse of discretion, *Washington,* 584 F.3d at 695. Accordingly, we give no deference to the district court's application of the *Strickland* ineffective-assistance standard to the facts of this case.[2]

III. DISCUSSION

A. The District Court's Decision To Allow Munoz's Untimely Rule 33 Motion

1. *Legal Standard*

At all relevant times, Rule 33 specified that "any motion for a new trial grounded on newly discovered

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[2] Indeed, in one unpublished case in which an ineffective-assistance claim was raised via Rule 33 motion, we stated that such claims are reviewed de novo, although we declined to review that claim for lack of a developed factual record. *United States v. Allen,* 254 F. App'x 475, 477 (6th Cir. 2007). Other circuits have similarly stated, in the context of Rule 33 appeals, that ineffective-assistance claims, as mixed questions of law and fact, are reviewed de novo. *See, e.g., United States v. Fuchs,* 467 F.3d 889, 910 (5th Cir. 2006); *United States v. Carbonaro,* 186 F. App'x 41, 42 (2d Cir. 2006).

evidence must be filed within 3 years after the verdict or finding of guilty," and that "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b).[3] Munoz does not assert that his ineffective-assistance claim is based on "newly discovered evidence," and, in any event, that argument is foreclosed in this circuit. *See United States v. Seago,* 930 F.2d 482, 488-89 (6th Cir. 1991) (stating that in general, "an ineffective assistance of counsel claim cannot be considered newly discovered evidence for the purpose of a motion for new trial"). Accordingly, his motion, which was filed six months after verdict, was prima facie untimely.

However, Rule 33 must be read in conjunction with Federal Rule of Criminal Procedure 45, which provides that "[w]hen an act must or may be done within a specified period, the court . . . may extend the time . . . on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b). *See* Advisory Comm. Notes to 2005 Amendments of Rule 33 ("[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if

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[3] The seven-day period for motions for "any reason other than newly discovered evidence" was extended to 14 days in 2009. This is of no moment for purposes of the present appeal.

the court determines that the failure to file it on time was the result of excusable neglect."); *United States v. Robinson,* 430 F.3d 537, 541 (2d Cir. 2005) ("The time limitations specified in Rule 33 are read in conjunction with Rule 45, which establishes how to compute and extend time.").[4]

We have never discussed what constitutes "excusable neglect" in the context of a late-filed Rule 33 motion. However, the term "excusable neglect" has been interpreted in other procedural contexts. In *Pioneer Investment Services Co. v. Brunswick Associates,* 507 U.S. 380 (1993), the Supreme Court construed the phrase "excusable neglect" as it is used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure:

> The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through carelessness.*" The word therefore

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[4] We note that in one published decision with facts similar to those in the present case, this court did *not* read Rule 33 in conjunction with Rule 45. *See United States v. Kuehne,* 547 F.3d 667, 692-93 (6th Cir. 2008) (stating that defendant's ineffective-assistance excuse "ma[de] intuitive sense," but refusing to consider that excuse on the ground that "Rule 33 itself speaks of no such exception"). However, at the time the motion at issue in *Kuehne* was made, Rule 45 explicitly stated that a court could *not* use that rule to extend the time to take action under Rule 33. This provision was removed effective December 1, 2005. *See* Advisory Comm. Notes to 2005 Amendments of Rule 45. Accordingly, *Kuehne* does not control this case.

> encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. . . . Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.
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> * * *
>
> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.

Id. at 388, 395 (internal citations omitted) (alteration in original). The Court then listed a number of non-exclusive factors to be balanced in making this equitable determination: "(1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith."

Nafziger, 467 F.3d at 522 (citing *Pioneer*, 507 U.S. at 395).[5]

Importantly, the *Pioneer* Court specifically rejected the appellate court's statement that, in the excusable-neglect inquiry, "it would be inappropriate to penalize respondents for the omissions of their attorney." 507 U.S. at 396. To the contrary, the Court stressed that, in general, "clients must be held accountable for the acts and omissions of their attorneys," *ibid.*, who are, after all, those clients' "freely selected agent[s]," *id.* at 397 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)). "Any other notion," the Court believed, "would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. . . ." *Ibid.* (quoting *Link*, 370 U.S. at 634). Consequently, the Court held that "in

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[5] While the *Nafziger* panel parsed the language of *Pioneer* as specifying five separate factors, other circuits have found only four, construing "the reason for the delay" and "whether the delay was within the reasonable control of the moving party" as a single factor. *See, e.g., Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 322-23 (3d Cir. 2001). We have also done so in an unpublished opinion. *See United States v. Williams*, No. 97-2328, 1998 WL 863748, at *2 (6th Cir. Nov. 23, 1993). It appears to this panel that the four-factor division is more faithful to the *Pioneer* Court's language. *See Pioneer*, 507 U.S. at 395 (listing among relevant factors "the reason for the delay, *including* whether it was within the reasonable control of the movant" (emphasis added)). We therefore treat these two considerations together in our analysis.

determining whether respondents' failure to [timely] file . . . was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." *Pioneer,* 507 U.S. at 396-97.

Subsequently, in *Stutson v. United States,* 516 U.S. 193 (1996), the Court suggested that the *Pioneer* excusable-neglect standard also applies in criminal cases – specifically, with respect to Federal Rule of Appellate Procedure 4(b), which governs when a late notice of appeal may be filed. *Id.* at 195-97; *see also United States v. Thompson,* 82 F.3d 700, 701-02 (6th Cir. 1996) (following *Stutson*). We therefore see no reason to believe that the *Pioneer* analysis would not also be applicable in the Rule 33 context, and, indeed, both parties submit that it is. We therefore turn to the district court's balancing of the *Pioneer* factors.

2. *Analysis of* Pioneer *Factors*

a. Reason for Delay and Whether Delay Was Within Munoz's Control

In this case, the time limit set forth in Rule 33 is unambiguous, and Bergmann's failure to timely file a motion was, in theory, entirely within his control. Given the *Pioneer* Court's admonition that clients must generally be saddled with the errors of counsel, it might appear at first glance that the reason-for-delay factor favors the government.

However, in the first place, it is significant that *Pioneer* was a bankruptcy case; as the district court

noted, *Pioneer*'s "your lawyer, your fault" principle should be applied less stringently in the criminal context, where "our legal traditions reflect a certain solicitude for [a defendant's] rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson,* 516 U.S. at 196; *see also United States v. Moses,* No. CR 05 061 E BLW, 2006 WL 581191, at *4 (D. Idaho Mar. 8, 2006) ("In the civil context, a client is bound by the acts and omissions of his or her attorney. . . . However, in determining what constitutes excusable neglect, the courts have generally been more solicitous of a criminal defendant's rights." (internal quotation marks and citations omitted)).

Secondly, we note that in the habeas context, courts have long made special procedural allowances for defendants who fail to timely raise ineffective-assistance-of-counsel claims against lawyers who continue to represent them at the time those claims would properly have been raised. As the Supreme Court has noted, it is axiomatic that "an attorney . . . is unlikely to raise an ineffective-assistance claim against himself." *Massaro v. United States,* 538 U.S. 500, 503 (2003); *see also Fautenberry v. Mitchell,* 515 F.3d 614, 640 (6th Cir. 2008) ("[W]e conclude that it would be unreasonable to expect counsel to raise an ineffective assistance claim against himself."). Aside from the potential conflict of interest inherent in such a claim – which we will address shortly – "[e]ven the scrupulous attorney searching the record in good faith would likely be blind to his [own] derelictions at

. . . trial. . . ." *Billy-Eko v. United States,* 8 F.3d 111, 114 (2d Cir. 1993), *abrogated on other grounds by Massaro,* 538 U.S. at 504.

Additionally, as the district court noted, in cases involving late-filed notices of appeal, several courts have either held or suggested that ineffective assistance of counsel may justify a finding of excusable neglect. For example, in *United States v. Clark,* the Fifth Circuit found excusable neglect under Federal Rule of Appellate Procedure 4(b) where the defendant's attorney had failed to file a notice of appeal despite the defendant's explicit request that he do so. 193 F.3d 845, 846-47 (5th Cir. 1999) ("[W]e are faced with a clear case of ineffective assistance of counsel, which is sufficient to prove excusable neglect."); *see also United States v. McKenzie*, 99 F.3d 813, 816 (7th Cir. 1996) (holding that "it was not an abuse of discretion for the district court to find [defendant's] neglect excusable and to grant an extension of time to file his notice of appeal" where defendant's attorney "le[ft] town and bec[ame] totally inaccessible" during relevant time period).

Such a holding initially appears to clash with the *Pioneer* Court's admonition that clients must generally bear the consequences of their attorneys' inexcusable errors. However, in addition to the civil/criminal distinction already discussed, the Eleventh Circuit has provided a satisfying rationale, grounded in the *Pioneer* Court's attorney-as-agent paradigm, for distinguishing cases of ordinary attorney error,

where clients will be bound by counsel's action, from cases of egregious acts and omissions:

> Respondents urge this Court to . . . hold[ ] that a client is always bound by the mistakes of his attorney, regardless how extreme or far afield from the client's directives those actions may be. . . . [This] "your lawyer, your fault" approach is consistent with the general principle [expounded in *Pioneer*] that lawyers are agents, and "clients must be held accountable for the acts and omissions of their attorneys."
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> [However,] under fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests. . . . [Thus,] when an attorney's actions extend beyond everyday mistakes into the realm of serious misconduct, . . . in some circumstances such malfeasance may be far enough outside the range of behavior that reasonably could be expected by a client . . . [that it would be inappropriate to] impute [such] attorney misconduct to [the] client. . . .

Downs v. McNeil, 520 F.3d 1311, 1319-21 (11th Cir. 2008) (internal quotation marks and citations omitted).

We note that the present case is not on all fours with prior cases where courts have found excusable neglect based upon ineffective assistance of counsel. In those cases, as the government notes, "the

[late-filing] party *intended* to comply with the applicable limitations period and, but for counsel's neglectful actions, would have done so." For example, in *Clark,* the defendant asked his counsel to timely file a notice of appeal, but counsel did not. 193 F.3d at 846-47. Here, by contrast, Munoz presumably had no *intent* to file a Rule 33 motion for ineffective assistance during the week when he could have timely done so; that intent only arose later, once he had acquired new counsel. Rule 45(b), however, does not require that the defendant have contemporaneously *intended* to comply with the relevant deadline. It merely requires that "the party [have] failed to act because of excusable neglect" – or, in the words of the *Pioneer* Court, that the party, for an excusable reason, "le[ft the act] undone or unattended to. . . ." 507 U.S. at 388.

Another distinction between the present case and the notice-of-appeal cases is that in those cases, the courts found that trial counsel's failure to timely file a notice of appeal was *itself* constitutionally ineffective assistance of counsel. Here, by contrast, the allegedly ineffective assistance occurred during the underlying trial; Munoz does not specifically argue that Bergmann's failure to timely file a Rule 33 motion was, *in itself,* ineffective assistance. However, that concern should not control the outcome of this case. As the Eleventh Circuit explained in *Downs,* clients may be excused under the *Pioneer* standard for their agents' egregious acts or omissions not because those acts or omissions violate the Sixth

Amendment right to counsel, but because of the agency-law axiom that a principal is not bound by his agent's conduct where the agent "is acting adversely to the principal's interests." *Downs*, 520 F.3d at 1320-21.

A situation like the one alleged in the present case – where an attorney refuses to fall on his own sword for his client, even though that is his client's last best hope – is a paradigmatic case of adverse interests:

> [T]here [is] a clear conflict between [a client's] interest in presenting and prevailing in his ineffective assistance claim and [his attorney's] interest in protecting himself from the damage such an outcome would do to his professional reputation and from exposure to potential malpractice liability or bar discipline. That an attorney would have great incentives to prevent a client from prevailing in an ineffective assistance claim [against him] is both self-evident and well documented in the case law. . . .

Manning v. Foster, 224 F.3d 1129, 1134-35 (9th Cir. 2000) (internal citations omitted) (holding, in habeas context, that client "may assert as cause for his procedural default the actions of his attorney which, even though not constitutionally defective, were not attributable to him" because they were "tainted by a conflict of interest").

Accordingly, we find that Bergmann's continuing representation of Munoz during the window for

timely filing a Rule 33 motion was a valid reason for the delay, and that the delay was not fairly within Munoz's control. This factor therefore favors Munoz.

b. Prejudice to the Government

The government argues that it would be prejudiced in four ways by having to retry Munoz after an additional six months' delay.[6] However, two of those – the fact that the government would have to "prepare and present [its] case over again," and the fact that Munoz "has now had the benefit of . . . hearing the government's case" – would be equally true had the motion been filed timely. Because these consequences cannot be attributed to Munoz's filing delay, they have no place in the *Pioneer* analysis. The government's third prejudice claim – that the passage of time compromises witnesses' memories – is true as a general matter, but, at least on the facts of this case, six months is not a sufficient period of time to create significant prejudice on that score.

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[6] The district court reasoned that no prejudice existed because "[t]he Government appears to have been in the same position to respond to [Munoz's new-trial] motion when it was filed in May 2007 as it would have been if [the motion had been timely] filed. . . ." *Munoz*, 2009 WL 529859, at *4. However, we agree with the government that the proper inquiry is the potential prejudice stemming from having to *retry the case* after a delay, rather than merely from having to respond to a belated motion.

The government's most substantial prejudice argument arises from the fact that, by the time Munoz filed his new-trial motion in May 2007, the testifying co-defendants, Tagaban and George, had already been sentenced (Tagaban in January 2007 and George in March 2007). In particular, both men had already received reduced sentences in exchange for their cooperation at Munoz's trial. Thus, the government argues, it now lacks leverage with which to assure their cooperation at Munoz's retrial – as opposed to the situation that would have existed if Munoz had timely filed his new-trial motion in November 2006.

However, Tagaban and George's plea agreements require them to testify truthfully "whenever" called by the government. If they do not testify truthfully at retrial, they would be in breach of those plea agreements, and, in theory, "the government [would have] the option to . . . seek specific performance of the agreement[s]. . . ." *United States v. Cimino,* 381 F.3d 124, 128 (2d Cir. 2004); *see also* LaFave, Criminal Procedure § 21.2(e) (3d ed. 2007). Perhaps more practically, the government may still exert substantial leverage over Tagaban and George by virtue of Federal Rule of Criminal Procedure 35(b), which allows a further sentence reduction for post-sentencing substantial assistance. Consequently, the prejudice factor does not clearly favor the government.

c. Length of Delay and Its Impact on Judicial Proceedings

The government argues that even if ineffective assistance of counsel is, in theory, a proper excuse, Munoz failed to act with diligence once Hall took over his representation. Hall filed her notice of appearance on February 13, 2007, and the district court authorized her to appear on February 22, 2007. Munoz did not request leave to file an untimely new-trial motion until five days thereafter, and did not actually *file* the motion for another ten weeks.

We have certainly found delays of this magnitude inexcusable in the past. *See, e.g., Nafziger,* 467 F.3d at 523 (37-day delay not excusable neglect under circumstances). However, we agree with the district court that Munoz's delay was not clearly inordinate *here,* given the sensitive posture in which Hall took over the case and the unique difficulties she presumably faced as a result. *See* Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel,* 99 Colum. L. Rev. 1103, 1131 (1999) (noting that, where successor counsel will be arguing former counsel's ineffective assistance, former counsel's "incentives not to help the client . . . [may] affect cooperation with successor counsel"); *cf. Massaro,* 538 U.S. at 506 (noting that appellate counsel may be in an "awkward position vis-à-vis trial counsel," as "trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own

incompetence"). We believe that a district judge is in the best position to know how long a diligent successor counsel would require to research and prepare a new-trial motion under the circumstances presented by any given case. Thus, the delay factor does not clearly favor the government.[7]

d. Good Faith

The government does not contest the district court's finding that Munoz's delay involved no bad faith.

3. *Balancing of* Pioneer *Factors*

The *Pioneer* factors "do not carry equal weight; the excuse given for the late filing must have the greatest import. While [the others] might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000); *accord United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 n.7 (2d Cir. 2003); *Hosp. del Maestro v. NLRB*, 263 F.3d 173, 175 (1st Cir. 2001).

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[7] Further, we note that Munoz promptly moved to continue sentencing once Hall appeared, such that, despite the delay, Munoz had not yet been sentenced and no appeal had been taken at the time Munoz filed his new-trial motion. There was therefore no waste of judicial resources as a result of Munoz's delay.

As we have concluded, this foremost *Pioneer* consideration favors Munoz. The remaining *Pioneer* factors are not clearly in favor of the government. Accordingly, we hold the district court did not abuse its discretion in concluding that Munoz's delay was the result of excusable neglect.[8]

B. Merits of Munoz's Rule 33 Motion

1. *Legal Standards*

a. Rule 33 Standard

Rule 33 provides that "[u]pon the defendant's motion, [a district] court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The rule "does not define 'interest[ ] of justice' and the courts have had little success in trying to generalize its meaning." *United States v. Kuzniar,* 881 F.2d 466, 470 (7th Cir. 1989). Nonetheless, from the body of Rule 33 case law, several recurring themes emerge.

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[8] The government worries that our holding will invite a deluge of opportunistic Rule 33 motions by convicted defendants, who, merely by crying ineffective assistance of counsel, will now be able to delay sentencing while they leisurely assemble the case for a new-trial motion. However, common sense suggests that district courts are capable of distinguishing clearly frivolous ineffective-assistance allegations from those with potential merit, and that – especially given the already overcrowded state of most district-court dockets – late-filed motions will not routinely be indulged.

The paradigmatic use of a Rule 33 motion is to seek a new trial on the ground that "the [jury's] verdict was against the manifest weight of the evidence." *United States v. Crumb,* 187 F. App'x 532, 536 (6th Cir. 2006); *see also United States v. Legette-Bey,* 147 F. App'x 474, 486 (6th Cir. 2005); *United States v. Graham,* 125 F. App'x 624, 628 (6th Cir. 2005); *United States v. Solorio,* 337 F.3d 580, 589 n.6 (6th Cir. 2003). Munoz, however, did not move for a new trial on manifest-weight-of-the-evidence grounds.[9]

Furthermore, it is widely agreed that Rule 33's "interest of justice" standard allows the grant of a new trial where substantial legal error has occurred. *See United States v. Wall,* 389 F.3d 457, 474 (5th Cir. 2004) (stating that "any error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial" (quoting Wright, Federal Practice & Procedure § 556 (3d ed. 2004))); *Kuzniar,*

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[9] In deciding Rule 33 motions based on the manifest weight of the evidence, we have said that a district judge "may 'sit as a thirteenth juror' and consider the evidence to ensure that there is no miscarriage of justice." *Legette-Bey,* 147 F. App'x at 486 (quoting *United States v. Ashworth,* 836 F.2d 260, 266 (6th Cir. 1988)); *see also Graham,* 125 F. App'x at 628 ("A district judge, in considering the weight of the evidence for purposes of adjudicating a motion for new trial, may act as a thirteenth juror, assessing credibility of witnesses and weight of the evidence."). Because Munoz did not base his new-trial motion on the manifest weight of the evidence, but rather, on the finding of a Sixth Amendment violation, the district court's reliance upon this "thirteenth juror" language was improper. *See Munoz,* 2009 WL 529859, at *2.

881 F.2d at 470 (stating that Rule 33 relief is available where "the substantial rights of the defendant have been jeopardized by errors or omissions during trial"); *United States v. De Miranda,* No. 2008-20, 2008 WL 5412848, at *3 (D.V.I. Dec. 29, 2008) (stating that Rule 33 relief is available where defendant "show[s] . . . reversible error at his trial"). A violation of Munoz's Sixth Amendment right to effective assistance of counsel clearly meets this standard. *See United States v. Bass,* 460 F.3d 830, 838 (6th Cir. 2006) (acknowledging that defendant may "s[eek] a new trial on the ground that his counsel allegedly rendered ineffective assistance"); *accord United States v. Russell,* 221 F.3d 615, 619 (4th Cir. 2000); *United States v. Mojica,* 984 F.2d 1426, 1452 (7th Cir. 1993); *United States v. Sands,* 968 F.2d 1058, 1066 (10th Cir. 1992); *United States v. Brown,* 476 F.2d 933, 935 (D.C. Cir. 1973).[10]

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[10] The government argues that the "preferred route" for entertaining ineffective-assistance claims is not via Rule 33 motion, but in a petition for habeas corpus. While we have certainly stated that, *as a general matter,* ineffective-assistance claims are best raised on habeas, this is only because in the mine run of cases, "the record of trial counsel's allegedly deficient performance is not fully developed" before that point. *United States v. Vallellanes,* 339 F. App'x 579, 584 (6th Cir. 2009). By contrast, we have not hesitated to consider ineffective-assistance claims outside the habeas context (most often, on direct appeal) "[i]f the parties have adequately developed the record. . . ." *United States v. Webber,* 259 F. App'x 796, 806 (6th Cir. 2008). In cases like this one, where the district court has conducted an evidentiary hearing on the ineffective-assistance

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Less clear is whether a district court may grant Rule 33 relief where the verdict is not against the substantial weight of the evidence, and where no reversible error or violation of the defendant's substantial rights has occurred, but where the district court nonetheless believes that "the interest of justice" requires a new trial. That question has particular significance in this case, as one such scenario might be where a defendant (such as Munoz) establishes that trial counsel's performance was in some way substandard, although not egregious enough to constitute a Sixth Amendment right-to-counsel violation – i.e., where a defendant shows "ineffective assistance light."

The generic "interest of justice" language in Rule 33's text, at least at first glance, would appear to permit the grant of a new trial on the basis of perceived unfairness of less than reversible magnitude. *Cf.* 28 U.S.C. § 2255 (stating that habeas relief may be granted where a sentence was "imposed in violation of the Constitution or laws of the United States. . . ."); *see also* Wright, Federal Practice & Procedure § 552 (3d ed. 2004) ("The grounds for relief are broader under [Rule 33] than under Section 2255. [Rule 33] allows a new trial whenever the interest of justice requires it, while the statutory remedy is limited to grounds that may be raised on collateral

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claim, deferring that claim until collateral review would serve no purpose.

attack, and thus for the most part reaches only constitutional defects in the proceedings.").

In one decision, the Eleventh Circuit held that the "interest of justice" is a "broad standard" that may be invoked even where the alleged defect "was not reversible error." *United States v. Vicaria,* 12 F.3d 195, 198-99 (11th Cir. 1994) (affirming grant of new trial where district court "concluded [in the interest of fairness] that it should have given [a jury] instruction it had declined [to give]," even though such an instruction was not required by law). Similarly, the Fifth Circuit has stated that, under certain conditions, "[a] district court may grant a new trial in the interest of justice even if it does not find that a specific legal error occurred at trial." *United States v. Scroggins,* 379 F.3d 233, 256-57 (5th Cir. 2004), *judgment vacated on other grounds,* 543 U.S. 1112, (2005) (holding that, even "[a]bsent legal error," district court may still grant a new trial based on two witnesses' failure to show up and testify, if it resulted in "a manifest injustice" and defendant "would have probably been acquitted" otherwise).

Vicaria and *Scroggins* appear to support the viability of an "ineffective assistance light" claim in the Rule 33 context. There is even a line of cases (albeit somewhat dated) from the District of Columbia Circuit specifically stating that "a more powerful showing of inadequacy [of counsel] is necessary to sustain a collateral attack than to warrant an order for new trial. . . ." *Bruce v. United States,* 379 F.2d 113, 117

(D.C. Cir. 1967); *see also United States v. Thompson*, 475 F.2d 931, 932 n.3 (D.C. Cir. 1973).

However, other circuits have refused to recognize "ineffective assistance light" as a viable ground for Rule 33 relief. The Seventh Circuit, for one, stated:

> [The District of Columbia] Circuit[ ] . . . [believes] that a "more powerful" showing of counsel's inadequacy is necessary to sustain a collateral attack on a conviction than would be necessary to obtain a favorable ruling on a motion for a new trial. We do not share that view. The constitutional standards governing adjudication of ineffective-assistance-of-counsel claims do not vary, in this Circuit at least, with the nature of the proceedings in which such claims are raised.

United States v. Ellison, 557 F.2d 128, 133-34 (7th Cir. 1977).

More recently, the Fifth Circuit noted that "[a]s an abstract matter, it might well be argued that the *Strickland* standard be applied only in collateral attacks, and that a somewhat more lenient standard ought to be utilized when the district court considers a motion for new trial." *United States v. Logan*, 861 F.2d 859, 864 (5th Cir. 1988). However, the *Logan* panel rejected this proposition, based on the *Strickland* Court's dictum that "[t]he principles governing ineffectiveness claims [enunciated in *Strickland*] should apply in federal collateral proceedings as they do on direct appeal *or in motions for a new trial*." *Logan*, 861 F.2d at 864 (quoting *Strickland*, 466 U.S.

at 697) (emphasis in *Logan*). Consequently, the *Logan* panel held that "in order to properly grant a new trial on [the] ground [of ineffective assistance], the district court must be able to determine that the *Strickland* [standard] is met." *Ibid.*

We have never considered the viability of an "ineffective assistance light" claim, or even the broader question of whether Rule 33 relief may be granted based on amorphous claims of trial unfairness that do not constitute reversible error. However, we have repeatedly cited and applied *Strickland* in holding that a district court did not abuse its discretion in *refusing* to grant a new-trial motion on ineffective-assistance grounds. *See, e.g., United States v. Holycross,* 333 F. App'x 81, 84 (6th Cir. 2009); *United States v. Allen,* 254 F. App'x 475, 476-78 (6th Cir. 2007); *Bass,* 460 F.3d at 838; *United States v. Garcia,* 19 F.3d 1123, 1126 (6th Cir. 1994).[11]

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[11] Of course, those cases' *holdings* are not directly on point, as "no Sixth Amendment violation, ergo *within* the district court's discretion to *refuse* Rule 33 relief" does not imply "no Sixth Amendment violation, ergo *outside* the district court's discretion to *grant* Rule 33 relief." However, the language we used in those cases is broad enough to encompass both of those propositions. *See, e.g., Holycross,* 333 F. App'x at 84 ("The district court may grant a motion for a new trial 'if the interest of justice so requires.' To succeed on a claim of ineffective assistance [in this context], a defendant *must* establish . . . that his attorney 'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment' – and that the errors were prejudicial."

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Finally, we note that the overarching Rule 33 standard is what the "interest of justice . . . requires," and that the *Strickland* test was specifically minted to determine whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. It could therefore be inferred that where a defendant cannot satisfy the *Strickland* standard, his trial *can* "be relied on as having produced a just result," and the "interest of justice" thus does not require a new trial.

Having said all of this, we nonetheless leave the resolution of the question to another day. First of all, the district court expressly based its new-trial grant on the finding that a full-fledged Sixth Amendment right-to-counsel violation had occurred. In fact, the district court was itself of the belief that "[t]he standard for judging an assertion of ineffective assistance of counsel in the context of Rule 33 is identical to the standard employed in the context of a habeas corpus petition – the standard set forth in *Strickland v. Washington*." *Munoz*, 2009 WL 529859, at *5 (citation omitted).[12]

(quoting *Strickland*, 466 U.S. at 6872) (internal citation omitted) (emphasis added)).

[12] In support of this proposition, the district court cited only two Michigan district-court cases, and did not address the *Strickland* Court's specific language or any of the out-of-circuit authorities discussed herein.

Further, while we often affirm incorrectly reasoned district-court judgments on alternative bases, *see Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002), "[t]his is our prerogative," and we need not do so, *Sellers v. Regents of the Univ. of California*, 432 F.2d 493, 496 (9th Cir. 1970). Here, because the parties have never addressed "ineffective assistance light" in their briefs or arguments, and the law is less than clear-cut, we believe it prudent to abstain from exercising this prerogative. *See Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Human Relations Comm'n*, 508 F.3d 366, 371 (6th Cir. 2007) (suggesting that it would be inappropriate to affirm on an alternative basis where parties would be "denied an opportunity to respond to the new theory"). Accordingly, we now turn to the district court's *Strickland* analysis.

b. *Strickland* Ineffective Assistance Standard

Once again, under *Strickland*, counsel's performance violates the Sixth Amendment only where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. To meet this test, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) that "counsel's performance [was] prejudicial to the defense. . . ." *Id.* at 688, 692.

Counsel's performance is objectively unreasonable only where "the identified acts or omissions were outside the wide range of professionally competent assistance," as determined by "prevailing professional norms." *Id.* at 690. In reviewing the adequacy of counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Where, as here, the adequacy of counsel's pretrial investigation is at issue, the *Strickland* Court stated:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91. "[T]he *defendant* must overcome the presumption that, under the circumstances, [a] challenged action [or omission] might be considered sound trial strategy." *Id.* at 690 (internal quotation marks omitted) (emphasis added).

Meanwhile, to establish prejudice, a defendant must show "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Ibid.* "When determining prejudice, [a court] must consider the errors of counsel in total, against the totality of the evidence in the case." *Stewart v. Wolfenbarger,* 468 F.3d 338, 361 (6th Cir. 2006).

2. *Munoz's Assertions of Ineffectiveness*

Munoz argues that Bergmann's assistance was ineffective in that he failed (1) to investigate potential character witnesses adequately, (2) to move for a change of venue or a continuance, (3) to cross-examine Tagaban adequately, and (4) to impeach Tagaban's testimony using the pre-sentence reports from his prior convictions and a prior inconsistent statement. None of these claims has merit.

a. Inadequate Investigation of Character Witnesses

As the district court described the trial, the "principal, if not only, issue" to be decided by the jury was "the credibility of Mr. Munoz, presumably versus that of Mr. Tagaban. . . ." Thus, the district court reasoned,

> it [was] imperative that Mr. Munoz's defense counsel devote intense efforts to preparing for a credibility contest between Mr. Munoz and Mr. Tagaban. Such efforts may

> reasonably have included interviewing individuals who might have been able to serve as character witnesses and to testify as to the respective reputations for veracity of Mr. Munoz and Mr. Tagaban. *See United States v. Polsinelli,* 649 F.2d 793, 798 (10th Cir. 1981) (when the key issue is the jury's credibility determination between the main government witness and the defendant, "character witnesses . . . assume[] a position of greater importance than would be true in the ordinary case.").

Munoz, 2009 WL 529859, at *7.

The evidentiary hearing established that Munoz's sister had informed Bergmann "that a number of family members and other individuals within [Munoz's] community in Southern California would have been willing to serve as character witnesses for Mr. Munoz at trial." *Ibid.* Because "[t]he record [was] devoid of evidence showing that [Bergmann] interviewed these witnesses or conducted other investigation as to the possible value of their trial testimony," the district court concluded that Bergmann's performance was objectively unreasonable. *Ibid.*

This was error. The district court failed to note that Bergmann *did* locate and call a character witness, and an ideal one, at that – Fregoso, a law-enforcement officer who had been Munoz's neighbor for over 20 years. Indeed, the district court's opinion does not mention Fregoso's testimony. Moreover, because neither Bergmann nor Munoz testified at the

evidentiary hearing, the record was equally "devoid of evidence" showing that Bergmann *did not* conduct extensive investigation into other potential character witnesses, unbeknownst to Munoz's sister. Other than the fact that Bergmann successfully located Fregoso, the only conclusive fact in the record about Bergmann's pretrial investigation is the stipulation that Bergmann did not hire a professional investigator, which is not, in itself, particularly conclusive. *See Bower v. Quarterman*, 497 F.3d 459, 470 (5th Cir. 2007) ("Although [counsel] did not hire an independent investigator, this fact alone is not indicative of ineffective assistance[, even] in a capital case.").

The district court also found that Bergmann's purported failure to investigate character witnesses prejudiced Munoz's defense. It reasoned that "any extrinsic evidence regarding the relative credibility of Messrs. Tagaban and Munoz would have been particularly compelling to the trier of fact," since this case "c[ame] down to a one-on one situation, i.e., the word of the defendant against the word of the key prosecution witness. . . ." *Munoz*, 2009 WL 529859, at *9 (quoting *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985)). The district court therefore concluded that if Munoz had introduced character witnesses – or, more properly, if Munoz had introduced *additional* character witnesses – there was at least a reasonable probability that he would have "been able to tip the balance of [the] contest of credibility in favor of [his] side. . . ." *Ibid.*

We do not agree that there is a reasonable probability that the testimony of additional character witnesses would have affected the verdict.[13] First of all, the district court was incorrect in framing the case as a one-on-one credibility showdown between Tagaban and Munoz. Besides Tagaban's testimony, the government proffered the testimony of both Delaney and Frizzell that Munoz had confessed knowing that the fateful package contained drugs, as well as George's testimony that he had repeatedly paid Tagaban large amounts of cash for drugs "plain as day" in Munoz's presence. The "contest of credibility," therefore, was not as evenly matched as the district court's opinion suggests.[14]

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[13] We note that under Local Rule 43.2 of the Eastern District of Tennessee, "[e]xcept by leave of the Court, not more than 3 witnesses [may] be called to impeach or sustain the character of any party or other witness in a case."

[14] The district court acknowledged that Delaney and Frizzell's testimony supported Tagaban's version of events, but then immediately dismissed it. *See Munoz*, 2009 WL 529859, at *9 n.5 ("[T]he Court is of the opinion that the TBI Agents' interpretation of Mr. Munoz's statements in response to their questions could have easily been in error."). If Munoz had moved for a new trial on substantial-weight-of-the-evidence grounds, the district court would indeed have been at liberty to "act as a thirteenth juror" and give Delaney and Frizzell's testimony no weight. *Graham*, 125 F. App'x at 628. However, because Munoz's motion was premised on *legal* error, the district court was not sitting as a "thirteenth juror," and was not free to discount Delaney and Frizzell's testimony altogether based upon the mere possibility that a misunderstanding had occurred. *See supra* n.9.

Further, additional character testimony would have been largely cumulative of what was elicited at trial. In addition to Fregoso's testimony, Bergmann successfully elicited favorable character testimony from the government's own star witness, Tagaban, who agreed that he had "[a]lways known [Munoz] to be an honest, hard-working man." Furthermore, the *government itself* acknowledged during summation that Munoz was "a very sympathetic individual" and that it "would rather have Richard Munoz testifying against Tagaban at trial" than the other way around. In this context, it is simply implausible that additional generic testimony about Munoz's good reputation for truth in the community would have tipped the scales in the other direction. *See United States v. Colomb*, 419 F.3d 292, 301 (5th Cir. 2005) ("Character witnesses necessarily testify to a limited range of issues, and such testimony is often cumulative when presented by several witnesses.").[15]

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[15] The ineffective-assistance cases cited by Munoz holding that additional *alibi* witnesses would not have been cumulative are not on point. An alibi witness's testimony is based on direct first-hand knowledge that a defendant could not have committed the charged offense, and, if believed, is inherently dispositive of the case, in a way that testimony of good character is not. *See Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (stating that the truth of defendant's alibi, where one is raised, is "*the* issue in the case").

b. Failure To Move for Change of Venue or Continuance

The district court acknowledged that venue was proper in the Eastern District of Tennessee and that it was "unlikely that a compelling argument for change of venue could have been asserted" until the eve of trial. However, the district court concluded that once Munoz's final co-defendant, George, pleaded guilty, "the fundamental character of the case . . . changed dramatically." *Munoz*, 2009 WL 529859, at *7. Although the court-imposed deadline for pretrial motions had expired by that juncture, the district court concluded that a reasonably effective lawyer would nonetheless have moved for a change of venue to the Southern District of California, where Munoz resided – or at the very least, a continuance – because "it would be difficult to understate the . . . practical and logistical limitations [to Munoz's ability to subpoena trial witnesses] when considering the distance between the Eastern District of Tennessee and the Southern District of California. . . ." *Id.* at *8.

We disagree that Bergmann's failure to move for a change of venue on the eve of trial was necessarily deficient performance. Once again, because Bergmann did not testify, we do not know why he declined to so move. As a long-time member of the local bar,[16]

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[16] *See* Board of Professional Responsibility of the Supreme Court of Tennessee Online Attorney Directory, at http://www.tbpr.org/Consumers/AttorneySearch/ (stating that Bergmann

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he may well have felt that his familiarity with the trial judge would be a great help to his case or that his own argument style or mannerisms would be received more favorably by a local Tennessee jury. Either would constitute "sound trial strategy." *Strickland;* 466 U.S. at 689.

Further, Munoz cannot show prejudice here either. As already discussed, there is not a reasonable probability that Bergmann's failure to investigate and call additional character witnesses changed the outcome of the trial; a fortiori, there is no reasonable probability that the verdict would have been otherwise if Bergmann had secured a change of venue or a continuance, and thereby been able to put additional character witnesses on the stand. Nor is it relevant, as Munoz posits, that "the jury pool in Southern California would have included a greater percent of Hispanic people" who would have been less "likely to group the Mexican-Americans [i.e., Munoz and Tagaban] together and . . . find a 'conspiracy' between these superficially similar individuals." Appellee's Br. at 34-35. We are not free to presume that the Tennessee jury acted based upon racial prejudice or stereotyping, as courts considering ineffectiveness claims must "proceed on the assumption that the decisionmaker [was] . . . impartially applying the

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has been licensed to practice law in Tennessee since 1981) (last visited May 12, 2010).

standards that govern[ed] the decision." *Strickland,* 466 U.S. at 694.

c. Failure To Adequately Cross-Examine Tagaban

Next, Munoz argues that Bergmann was ineffective in failing to adequately cross-examine Tagaban (or, technically speaking, to adequately *re*-cross him) regarding the statement he gave to Delaney and Frizzell upon his arrest.

At the start of Tagaban's direct examination, the government introduced Tagaban's favorable plea agreement and questioned him about it, presumably to "draw the sting" of Bergmann's inevitable attempt to impeach Tagaban on that basis. Sure enough, Bergmann then cross-examined Tagaban at length regarding the plea agreement, including the fact that Tagaban had two prior felony convictions and would therefore receive a 20-year minimum sentence but for his cooperation with the government. Bergmann's cross-examination culminated with this exchange, clearly suggesting that Tagaban had a motive to lie:

> Q. All right. If you do all these things, if you testify, if you – you have to provide substantial assistance in the prosecution . . . then you're hoping that the government will recommend a downward departure, right, on your sentencing?
>
> A. Yes sir.

* * *

Q. You . . . hope that you don't have to do 20 years?

A. No, no, sir.

Q. So a lot today depends on your testimony. Is that right?

A. I guess so, sir.

On redirect, the government attempted to rehabilitate Tagaban by pointing to a contemporaneous statement he had given to Delaney and Frizzell *before* he entered into the plea agreement, presumably to show that Tagaban had made prior statements consistent with his trial testimony before he had a motive to lie:

Q. You were arrested on July 27, correct? . . . What you said to [the officers] that day, before you ever had a plea agreement with the government, was that pretty much what you said here today?

* * *

A. Well, I told them what [Munoz] had done, but I didn't go into any specific detail.

Q. I see. But you did say that Munoz had taken Fed Ex packages for you, didn't you?

A. Yes, sir. Yes, sir.

Q. You said that he'd done it on two occasions, correct?

A. Correct.

Bergmann then performed a brief re-cross, during which he elicited from Tagaban that he had "cooperated from the beginning" – even before the plea agreement was signed – because, *even then,* he hoped for "some consideration on [his] sentence." In other words, Bergmann undercut the government's attempt to rehabilitate Tagaban by prior consistent statement by pointing out that Tagaban already had a motive to lie at the time he made that earlier statement.

Munoz argues that Bergmann was ineffective because he failed to highlight on re-cross that Tagaban's prior "consistent" statement to Delaney and Frizzell – i.e., that "Munoz had taken the Fed Ex packages for [Tagaban]" – said nothing about whether Munoz *knew* that the packages contained drugs. In other words, the supposed prior "consistent" statement actually *neither* supported *nor* contradicted the most critical part of Tagaban's trial testimony. Accordingly, it did not truly show that Tagaban was telling the same story before he had a motive to lie.

While a shrewd cross-examiner might have pointed this out, Bergmann's failure to do so did not fall below an objective standard of reasonableness. After skillfully impeaching Tagaban, Bergmann *did* undermine the government's attempt to rehabilitate him, albeit on a different basis: the fact that Tagaban's motive to lie preceded the prior "consistent" statement. That Bergmann did not spot, or did not choose to emphasize, *every* basis for undermining the rehabilitation of Tagaban does not render

his re-cross constitutionally ineffective.[17] "[T]he Sixth Amendment guarantees reasonable competence, not perfect litigation." *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004).[18]

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[17] At the time of Tagaban's contemporaneous interview with Delaney and Frizell, Tagaban – assuming his trial testimony was truthful, as the jury evidently concluded – would not have known that Munoz would later assert a lack-of-knowledge defense. Accordingly, Tagaban would have had no reason to *preemptively* raise the issue of Munoz's state of mind at that time. Thus, it is not inherently suspect that Tagaban did not mention Munoz's state of mind during that interview. As a result, the re-cross that Bergman failed to perform would not have impeached Tagaban's credibility; rather, at most, it would have been a second method of undermining the government's attempt to rehabilitate Tagaban by means of his prior "consistent" statement.

[18] The cases Munoz cites for the proposition that "[t]he failure to adequately cross-examine a key witness against the defendant constitutes [ineffective assistance]" are clearly distinguishable, Appellee's Br. at 28, in that they involve the failure to cross-examine altogether, or the failure to bring up glaringly obvious grounds for impeachment. *See, e.g., Higgins v. Renico*, 470 F.3d 624, 632 (6th Cir. 2006) (finding ineffective assistance where counsel entirely "fail[ed] to confront and cross-examine . . . the sole eyewitness"); *Reynoso v. Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006) (finding ineffective assistance where counsel did not cross-examine the two eyewitnesses about the fact that they stood to receive a $25,000 reward if defendant was convicted).

d. Failure To Investigate Other Impeachment Evidence Against Tagaban

Finally, Munoz argues that Bergmann was ineffective in failing to turn up two sources of impeachment evidence against Tagaban: the pre-sentence reports from his prior convictions (although the convictions themselves were brought out during cross-examination) and the testimony of George McCay as to a prior inconsistent statement by Tagaban.

Munoz argues that the pre-sentence reports from Tagaban's prior convictions "reveal that Tagaban has a pattern of shifting blame onto others." One report, in a domestic violence case, states that Tagaban had claimed that his wife had attacked him first. Another report, in a drug case, states that Tagaban had claimed that the drugs found on his person belonged to someone else. Had Bergmann located these reports, Munoz argues, he would have been able to demonstrate Tagaban's "modus operandi of . . . always shift[ing] blame," and would thereby have been able to undermine Tagaban's credibility. We disagree. First, once again, because Bergmann did not testify, we do not actually know that Bergmann failed to locate the reports, rather than simply deciding, after locating and examining them, that they would not be of use. This would have been a reasonable professional judgment, as the two facially unrelated incidents described in the reports do not demonstrate a particularly compelling "modus operandi," and would

thus have been of only marginal utility in impeaching Tagaban's truthfulness. For that same reason – and because the reports have no bearing on the credibility of Delaney, Frizzell, and George – even if Bergmann did not locate the reports, his failure to introduce them at trial did not prejudice Munoz.

Additionally, Munoz points to the triple-hearsay affidavit of a San Diego investigator averring that he had spoken to a man named George McCay, who is currently incarcerated for marijuana importation and who claims to have met both Tagaban and Munoz in a California jail. According to the investigator's affidavit, "Mr. McCay . . . recalls Mr. Tagaban telling him that Mr. Munoz was innocent." However, yet again, because neither Bergmann nor Munoz testified at the hearing, there is no basis in the record to conclude that Bergmann actually failed to locate McCay. It is equally plausible that Bergmann knew of McCay but felt that placing an incarcerated *drug importer* on the stand to testify on Munoz's behalf in a *drug trial* would associate Munoz with drugs in the minds of the jury, and that this would hurt Munoz more than McCay's testimony would help him. This would not be an unreasonable judgment, because McCay's hearsay testimony could have been used only for the limited purpose of impeaching Tagaban by prior inconsistent statement, not for the truth of the matter asserted – i.e., that Munoz was actually "was innocent." *See* Fed. R. Evid. 613, 802. For this same reason – and because McCay's testimony could not have been used to impeach the credibility of Delaney,

Frizzell, or George – even if Bergmann did not locate McCay, this did not prejudice Munoz.

3. *Ultimate* Strickland *Determination*

We conclude that Bergmann's representation more than satisfied the minimum constitutional standard set forth in *Strickland*. In holding otherwise, the district court committed legal error and thereby abused its discretion.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of a new trial is **REVERSED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

UNITED STATES OF AMERICA	)	No. 4:06-cr-23-2
	)	
v.	)	Judge Mattice
RICHARD MUNOZ	)	

MEMORANDUM AND ORDER

(Filed Mar. 2, 2009)

Before the Court is the Motion for a New Trial of Defendant Richard Munoz [Court Doc. 133]. In that motion, Mr. Munoz asserts that: "1) it is in the interests of justice to grant a new trial since his first trial was marred by ineffective assistance of counsel; and 2) newly discovered evidence warrants the granting of a new trial." For the reasons explained below, Mr. Munoz's instant motion will be **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was initiated by a three-count indictment [Court Doc. 1] in which six individual defendants were charged. They were: Jose Luis Tagaban, Richard Munoz, Aaron George, Jacki McBride, Carol Ann O'Neal and Ronnie Lee Young. The charges were: (1) conspiracy to distribute 500 grams or more of methamphetamine (Count One, naming all defendants), (2) possession with intent to distribute methamphetamine (Count Two, naming O'Neal and

Young), and (3) distribution of 500 grams or more of methamphetamine (Count Three, naming Tagaban and Munoz).

The underlying scheme and activities which gave rise to the charges, as revealed in the various sealed Plea Agreements and Presentence Investigative Reports in the case, were as follows. George and McBride, residents of Arizona, would transport or otherwise furnish narcotics for resale to residents of Tennessee, among them O'Neal and Young. Upon being arrested, George revealed that his source for the narcotics was Tagaban, a resident of Imperial, California.

Acting on this information, law enforcement authorities devised a sting operation, designed to apprehend Tagaban, which involved intercepting a shipment of narcotics from Tagaban to George via FedEx. During this operation, Mr. Munoz was observed retrieving monies which had been wired from George to Tagaban as payment for the narcotics and, on another occasion, delivering a package to a FedEx office. This package was later determined to have contained methamphetamine.

Upon being apprehended, all defendants except Mr. Munoz confessed[1] and agreed to cooperate with the authorities. Mr. Munoz, on the other hand, proceeded

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[1] As discussed in footnote 5 below, whether Mr. Munoz's statements to law enforcement authorities upon being arrested constituted a confession was a disputed issue at his trial.

to trial, which began on November 7, 2006, in Winchester, Tennessee. At his jury trial, Mr. Munoz was convicted on Counts One and Three of the Indictment. (Verdict Form, Court Doc. 77.)

Subsequent to his conviction, Mr. Munoz filed a Motion for Judgment of Acquittal of Defendant Richard Munoz [Court Doc. 61] pursuant to Federal Rule of Criminal Procedure 29. The Court denied Mr. Munoz's Rule 29 motion, concluding that:

> The critical disputed fact at trial was whether Defendant Munoz knew that a package which he admitted to placing in interstate commerce contained methamphetamine. This disputed fact was the subject of extensive contradictory testimony, principally by Government witness Jose Tagaban and Defendant Munoz himself. The Court, having observed the testimony of Mr. Tagaban and Mr. Munoz at trial, and having subsequently reviewed the transcript of that testimony, cannot conclude that no rational trier of fact could find Mr. Munoz guilty beyond a reasonable doubt. This conclusion, coupled with the legal constraint that, in considering the instant Rule 29 motion, the Court is precluded from assessing the credibility of the witnesses or substituting its judgment for that of the trial jury, leads inescapably to the conclusion that Defendant Munoz's instant motion must be **DENIED**.

(Memorandum and Order, Court Doc. 93, p. 4.)

Subsequently, on May 8, 2007, following a change of counsel and over three months after the denial of Mr. Munoz's Motion for Judgment of Acquittal, Mr. Munoz filed the instant motion. In it, Mr. Munoz contends that he is entitled to a new trial because "1) it is in the interests of justice to grant a new trial since his first trial was marred by ineffective assistance of counsel; and 2) newly discovered evidence warrants the granting of a new trial." (Def.'s Motions for New Trial, Court Doc. 133, p. 1.) In response, the Government argues that Mr. Munoz's motion is untimely unless based on newly discovered evidence, that the motion should be denied because motions for a new trial based on newly discovered evidence are generally disfavored and, in any event, ineffective assistance of counsel is not "newly discovered evidence" within the meaning of Fed. R. Crim. P. 33. (Response of the United States to Defendant's Motion for a New Trial, Court Doc. 135; Government's Post-Hearing Response to Defendant's Motion for New Trial, Court Doc. 145, p. 7-8.)

II. STANDARD OF REVIEW

Rule 33 of the Federal Rules of Criminal Procedure states, in pertinent part:

> **(a) Defendant's motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . . .
>
> **(b) Time to File.**

> **(1) Newly Discovered Evidence.** Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. . . .
>
> **(2) Other Grounds.** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

Fed. R. Crim. P. 33.

As noted above, the Court previously denied Mr. Munoz's Motion for Judgment of Acquittal, filed pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (Court Doc. 93.) While both Rule 29 and Rule 33 of the Federal Criminal Rules deal with post-trial procedures, and while motions under these rules are often filed concurrently and are sometimes combined, the two rules are governed by very different standards. As noted by a leading commentator, the perspective from which the court must approach a Rule 33 motion differs significantly from that for a Rule 29 motion:

> On a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.

> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses.

3 Charles Alan Wright, Nancy King & Susan Klein, Federal Practice and Procedure § 553 (3d ed. 2004). It has often been said that the Court sits as a "thirteenth juror" when deciding on a Rule 33 motion involving conflicting evidence, as is the case with the instant motion. *See, e.g., United States v. Ashworth,* 836 F. 2d 260, 266 (6th Cir. 1988).

While there is substantial authority supporting the proposition that motions for new trial on the grounds of newly discovered evidence are not favored and are to be granted with caution, *see, e.g., United States v. Lanier,* 238 F.3d 425, 2000 WL 1720917, at *3 (6th Cir. Nov. 6, 2000); *United States v. O'Dell,* 805 F. 2d 637, 640 (6th Cir. 1986), *cert. denied,* 484 U.S. 859 (1987), "[i]t is a mistake to extend this proposition to motions for new trial because of trial errors and other grounds. Here the motion should be neither favored nor disfavored, and the question is only what the interest of justice requires." 3 Wright, *et al., supra* at § 551; *see also United States v. Scroggins,* 379 F.3d 233, 253 (5th Cir. 2004), *vacated on other grounds,* 543 U.S. 1112 (2005) (motions for new trial based on interest of justice are not subjected to more rigorous standard of new trial motions based on newly discovered evidence). In either case, however, the defendant bears the burden of showing that a new trial

should be granted. *United States v. Seago,* 930 F.2d 482, 488 (6th Cir. 1991).

III. ANALYSIS

Mr. Munoz originally argued that the interests of justice required a new trial because: (1) his first trial was marred by ineffective assistance of counsel and (2) newly discovered evidence has revealed the need for a new trial. As the parties' respective arguments have evolved and been refined in the course of the briefing, Mr. Munoz has conceded that his stronger argument is interests of justice based on ineffective assistance of counsel. (Supplemental Points and Authorities in Support of Motion for New Trial, Court Doc. 142, p. 2, fn. 2; Defendant's Reply to Government's Response to Motion for New Trial, Court Doc. 149, p. 5). The Court agrees, and will confine its analysis to this argument.

A. Timeliness of Mr. Munoz's Motion

Before turning to the merits of the instant motion, the Court must address whether it was timely filed. Although a Rule 33 motion must ordinarily be filed within seven days of the jury verdict, *see* Fed. R. Crim. P. 33(b)(2) ("Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty."), the seven-day rule may be flexibly applied. *See* Fed. R. Crim. P. 45(b)(1) ("When an act must or may be done within a specified period,

the court on its own may extend the time, or for good cause may do so on a party's motion made: . . . (B) after the time expires if the party failed to act because of excusable neglect.").

The former version of Rule 33 did not permit extensions of time. *See, e.g., Carlisle v. United States,* 517 U.S. 416, 420 (1996). However, "Rule 33 was amended in 2005 to allow the district court discretion to grant a defendant an extension of time to move for a new trial." *Nat'l Ecological Found. v. Alexander,* 496 F.3d 466, 475 n.7 (6th Cir. 2007). Accordingly, the seven-day time limit is no longer jurisdictional. *See Eberhart v. United States,* 546 U.S. 12, 19 (2005) (per curiam) (denominating Rule 33 a "claim processing rule[ ]").

The 2005 Commentary to Rule 33 states: "[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect." In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 395 (1993), the Supreme Court set out five factors for courts to balance in determining the [sic] whether a missed deadline was the product of excusable neglect:

(1) the danger of prejudice to the nonmoving party,

(2) the length of the delay and its potential impact on judicial proceedings,

(3) the reason for the delay,

(4) whether the delay was within the reasonable control of the moving party, and

(5) whether the late-filing party acted in good faith.

Nafziger v. McDermott Int'l, Inc., 467 F.3d 514, 522 (6th Cir. 2006) (citing *Pioneer*, 507 U.S. at 395).

With regard to the first factor, the Government does not assert that it was prejudiced by Mr. Munoz's delay in filing the instant motion. The Government appears to have been in the same position to respond to the instant motion when it was filed in May 2007 as it would have been if filed within seven days of the jury verdict. Accordingly, the Court finds that the first factor weighs in favor of finding excusable neglect.

The second factor must be evaluated in the specific context of this case. After a two day trial, during which the Mr. Munoz was represented by appointed counsel, the jury returned a guilty verdict on November 8, 2006. (Court Doc. 77.) Mr. Munoz's trial counsel moved to withdraw on January 4, 2007 and his withdrawal was granted on February 22, 2007. (Court Docs. 86, 109.) Five days later, Mr. Munoz's current counsel requested leave to file the

instant motion on the basis that his trial counsel was ineffective. (Court Doc. 110.)

The instant motion was certainly filed in excess of the seven day time limit outlined in Rule 33. The delay was not excessive, however, considering that Mr. Munoz was represented by the allegedly ineffective counsel for the vast majority of that time. Once Mr. Munoz's current counsel took control of the case, the delay in filing the instant motion was minimal.

The Court cannot ascertain any significant impact on the judicial proceedings caused by the delay in this case. As noted above, the Government has not alleged any prejudice as a result of the delay. Because trial had already been completed, procedurally all that remains is Mr. Munoz's sentencing hearing. Accordingly, the second factor weighs in favor of finding excusable neglect.

As to the third factor, Mr. Munoz argues that the failure to file a motion for new trial within seven days was "an understandable and excusable omission" because the basis for such motion is ineffective assistance on the part of the trial counsel. (Court Doc. 133 at 9.) It is axiomatic that trial counsel would not file a Rule 33 motion based on ineffective assistance. As noted in one prominent legal publication, "[t]here may well be cases in which a new trial should be granted in the interests of justice, but . . . [trial counsel] may be reluctant to raise it, as in the case of ineffective assistance of counsel." 3 Wright *et al.*, *supra* § 551 n.11 (quoting Daniel A. Rezneck, *The*

New Federal Rules of Criminal Procedure, 54 Geo. L.J. 1276, 1316 (1966)).

Although the Sixth Circuit has not addressed whether ineffective assistance of counsel can constitute excusable neglect, other circuits have recognized the possibility. *See, e.g., United States v. Clark,* 193 F.3d 845, 847 (5th Cir. 1999) (finding that ineffective assistance of counsel is sufficient to prove excusable neglect); *United States v. Smith,* 2008 WL 55996, *2 (10th Cir. Jan. 4, 2008) (noting that ineffective assistance of counsel may qualify as excusable neglect pursuant to Rule 45(b)(1)(B)). The Court finds that the third factor weighs in favor of finding excusable neglect.

In evaluating the fourth factor, courts ordinarily focus on the conduct of the attorney and whether it was excusable. *See Pioneer,* 507 U.S. at 396. The client is then typically held responsible for their attorney's actions. *Id.* Courts have been more protective of a criminal defendant's rights, however, and have been more flexible with regard to attributing an attorney's neglect to their client in the criminal context. *See Stutson v. United States,* 516 U.S. 193, 196 (1996) (per curiam) (noting that the court's interest in judicial efficiency and finality must accommodate a criminal defendant's rights).

In this case, nothing in the record suggests that Mr. Munoz's trial counsel could not have filed a Rule 33 motion within seven days of the jury's verdict, which weighs against finding excusable neglect.

However, because Mr. Munoz was still represented by his trial counsel at that point, the attorney who was empowered to file the Rule 33 motion within seven days of the jury verdict is the same attorney who Mr. Munoz now claims was ineffective. As noted above, it is easy to see why trial counsel did not file the instant motion. Accordingly, although the Court finds that the fourth factor weighs against Mr. Munoz, it does not afford this factor substantial weight.

As to the fifth factor, the Court finds that the delay in filing Mr. Munoz's motion was not due to bad faith. In fact, Mr. Munoz's current counsel moved for leave to file the instant motion only five days after the order substituting counsel was entered. Accordingly, the fifth factor weighs in favor of finding excusable neglect.

Ultimately, the determination of excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer,* 507 U.S. at 395. Considering all of the above, the Court finds that Mr. Munoz's failure to file his motion for a new trial within seven days of the jury verdict was the result of excusable neglect. Accordingly, the Court finds that Mr. Munoz's motion for a new trial based on ineffective assistance of counsel is timely and will dispose of the motion on its merits.

B. Whether Mr. Munoz was Denied Effective Assistance of Counsel

Courts have recognized that ineffective assistance of counsel may be asserted as a basis for a new trial under Rule 33. *See, e.g., United States v. Allen,* 2006 WL 1897899, at *1 (E. D. Mich. July 11, 2006); *United States v. Box,* 144 F.Supp.2d 892, 901 (W.D. Mich. 2001). The standard for judging an assertion of ineffective assistance of counsel in the context of Rule 33 is identical to the standard employed in the context of a habeas corpus petition – the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *Allen,* 2006 WL 1897899, at *1. Under *Strickland,* in order to obtain relief, a convicted defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness according to prevailing norms of the legal profession, and (2) counsel's deficient performance was prejudicial to the defense. 466 U.S. at 687-88, 692.

The burden is generally on a defendant to prove both the deficient performance and the prejudice prongs of the *Strickland* test. *Stewart v. Wolfenbarger,* 468 F.3d 338, 350 (6th Cir. 2006). In evaluating Mr. Munoz's instant claim – that in his trial, he was denied effective assistance of counsel – the Court will address each prong in turn.

1. Whether the Performance of Mr. Munoz's Trial Counsel Fell Below an Objective Standard of Reasonableness

The first prong of the *Strickland* test relates to counsel's professional competence. In order to demonstrate a constitutionally cognizable deficiency, a defendant must show that his attorney's performance fell below an "objective standard of reasonableness." *Rickman v. Bell,* 131 F.3d 1150, 1154-55 (6th Cir. 1997), *cert. denied,* 523 U.S. 1133 (1998). While there is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, *id.,* claims relating to counsel's allegedly inadequate preparation have traditionally proven to be a fertile ground for successful challenges based on ineffective assistance. *See, e.g., White v. McAninch,* 235 F.3d 988, 997-98 (6th Cir. 2000); *Combs v. Coyle,* 205 F.3d 269, 288 (6th Cir. 2000), *cert. denied,* 531 U.S. 1035 (2000).

Before beginning this analysis, the Court must note a peculiar aspect of this case which it believes to be highly pertinent to Mr. Munoz's instant motion. The case was charged, in Count One of the Indictment, as a conspiracy naming six individuals who were from three different federal judicial districts. Messrs. Tagaban and Munoz resided, and committed all overt acts related to the charged conspiracy, in the Southern District of California; Mr. George and Ms. McBride resided in the District of Arizona, and committed overt acts there and in the Eastern District of Tennessee; and Ms. O'Neal and Mr. Young resided in,

and committed all overt acts related to the conspiracy, in the Eastern District of Tennessee.

Accordingly, venue for this alleged criminal conspiracy properly lay in any one of the three federal judicial districts in which the alleged conspiracy was begun, continued, or completed. 18 U.S.C. §3237(a). The above-captioned case arguably could have been brought against the six defendants in any of these three judicial districts. *See, e.g., United States v. Crozier,* 259 F.3d 503, 519 (6th Cir. 2001), *cert. denied,* 534 U.S. 1149 (2002) (venue is proper in the district in which a co-conspirator committed any overt act in furtherance of the conspiracy, even if the defendant never entered the district in which the indictment was brought). Under these circumstances, it seems unlikely that a compelling argument for change of venue could have been asserted by any defendant at any time early in the case.

Shortly before the commencement of Mr. Munoz's trial,[2] however, all other defendants notified the Government of their intention to plead guilty and, presumably, of their willingness to testify as a

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[2] The Court's docket sheet reflects that the Court was notified of the intention of Mr. George, the last of the other defendants to plead guilty, on October 26, 2006, (*see* Court Doc. 55), only 12 days before the start of Mr. Munoz's trial and one day before the expiration of the plea deadline in the case. (*See* Court Doc. 35).

Government witness at Mr. Munoz's trial.[3] By that time, the court-imposed deadline for motions to be filed – October 10, 2006 – had expired.

At this late date in the proceedings, with Mr. Munoz the only remaining defendant, it should have suddenly become apparent that the fundamental character of the case had changed dramatically. Rather than being a case about a transcontinental drug distribution conspiracy, it should have become apparent that the sole issue at trial would be what role, if any, Mr. Munoz, had played in that conspiracy. Mr. Munoz's only alleged role in the conspiracy arose out of his connection to, and his dealings with, Mr. Tagaban. Under these circumstances, competent defense counsel should have been able to anticipate that the principal, if not only, issue at trial would be the credibility of Mr. Munoz, presumably versus that of Mr. Tagaban, in describing that role.

At that point, and even if it had not been so clear previously, it became imperative that Mr. Munoz's defense counsel devote intense efforts to preparing for a credibility contest between Mr. Munoz and Mr. Tagaban. Such efforts may reasonably have included interviewing individuals who might have been able to serve as character witnesses and to testify as to the respective reputations for veracity of Mr. Munoz and Mr. Tagaban. *See United States v. Polsinelli,* 649 F.2d

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[3] Mr. George and Mr. Tagaban did, in fact, testify on behalf of the Government at trial.

793, 798 (10th Cir. 1981) (when the key issue is the jury's credibility determination between the main government witness and the defendant, "character witnesses . . . assume[ ] a position of greater importance than would be true in the ordinary case.")

To provide constitutionally sufficient representation, defense counsel is required to reasonably investigate the facts of the case or reasonably determine that an investigation is not necessary. *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997). Failure to conduct a reasonable investigation is deficient performance. *Strickland,* 466 U.S. at 691; *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994).

"Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence." *Workman v. Tate,* 957 F.2d 1339, 1345 (6th Cir.1992) (internal citations and quotations omitted). There is evidence in the record that a number of family members and other individuals within the community in Southern California would have been willing to serve as character witnesses for Mr. Munoz at trial. (Transcript of June 21, 2007 evidentiary hearing, pp. 34-36, 51-52.) The record is devoid of evidence showing that Mr. Munoz's trial counsel interviewed these witnesses or conducted other investigation as to the possible value of their trial testimony.

To be sure, Mr. Munoz's court-appointed defense counsel confronted a number of formidable obstacles in carrying out his duties in this case. Mr. Munoz was arrested and detained in the Southern District of California on July 27, 2006. At a August 11, 2006 detention hearing in San Diego, a $300,000 appearance bond was set, and Mr. Munoz was released from custody in California on August 25, 2006. It was not until September 11, 2006, however, that Mr. Munoz was arraigned before a Magistrate Judge in the Eastern District of Tennessee and his trial counsel was appointed. (Minutes of Arraignment before the Honorable Susan K. Lee, Court Doc. 34.) Mr. Munoz's trial counsel resided in and conducted business in the Eastern District of Tennessee while Mr. Munoz remained in California on bond. As far as appears from the record, Mr. Munoz's September 11, 2006 arraignment was his one and only face-to-face meeting with his attorney until the eve of trial.

In addition, and probably as much of a problem for Mr. Munoz's trial counsel as the lack of proximity to his client, was counsel's distance from anyone who might have been available to serve as a character witness for Mr. Munoz at trial. While parties to a federal criminal case enjoy nationwide service of process for trial subpoenas, Fed. R. Crim. P. 17(e)(1), it would be difficult to understate the readily apparent practical and logistical limitations attendant to this tool when considering the distance between the Eastern District of Tennessee and the Southern District of California.

Nevertheless, under the peculiar circumstances of this case, as they continued to unfold right up to the eve of Mr. Munoz's trial, court-appointed defense counsel was confronted with only two viable options which might have permitted him to effectively represent Mr. Munoz's interests. The first such option would have been to request, beyond the court-imposed motions deadline, a lengthy continuance of the trial date and to procure the necessary funds which might enable him to conduct the extraordinarily expensive and time-consuming transcontinental pretrial discovery which would permit him to adequately prepare for what would almost inevitably be a battle to support Mr. Munoz's credibility after he took the stand in his own defense at trial. The second such option, equally unpalatable but perhaps more expedient under all the circumstances, would have been to ask the Court for permission to file out-of-time and support a motion, pursuant to Fed. R. Crim. P. 21, to transfer venue for Mr. Munoz's trial to the Southern District of California, where Mr. Munoz and most, if not all, of the witnesses available and willing to testify as to the crucial disputed issue in the case, were located. Mr. Munoz's counsel did neither.[4]

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[4] Of course, if his decisions in this regard were part of a calculated trial strategy, Mr. Munoz's counsel actions or inactions might not constitute ineffective assistance of counsel. *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). The record is devoid, however, of any evidence to suggest that the failure to interview witnesses in the Southern District of California or to seek to have the case transferred there was part

(Continued on following page)

The Court can readily understand and sympathize with the quandary that Mr. Munoz's trial defense counsel must have suddenly and unexpectedly found himself in as the events of the case unfolded and as the trial date rapidly approached, as well as the very difficult choices and actions which those circumstances would have required counsel to take to protect his client's interests. These difficulties, however, cannot excuse Mr. Munoz's trial counsel from confronting the situation at hand and taking the appropriate action necessary to vindicate Mr. Munoz's Sixth Amendment right to effective assistance of counsel.

Reluctantly, the Court must conclude that under the admittedly difficult circumstances of this case, counsel's actions, or lack thereof, fell below the objective standard of reasonableness that is to be expected of effective trial counsel in similar situations. Accordingly, the Court finds that Mr. Munoz has satisfied his burden of proof with regard to the first prong of the *Strickland* test.

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of a conscious trial strategy on the part of Mr. Munoz's counsel, and the Court cannot conceive of a reasonable trial strategy which would incorporate these features. *See O'Hara*, 24 F.3d at 828 ("[A] failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted.").

2. Whether There Exists a Reasonable Probability That, But For Trial Counsel's Deficient Performance, the Result of Mr. Munoz's Trial Would Have Been Different

The second part of the *Strickland* test deals with prejudice to the defendant. In other words, in order to demonstrate that his counsel's deficient performance deprived the defendant of a constitutional right, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

The Court must therefore determine whether Mr. Munoz was prejudiced by his counsel's failure either to conduct extensive transcontinental pretrial discovery of character witnesses in the Southern District of California or, alternatively, to request that the Court transfer venue of Mr. Munoz's trial to the Southern District of California. Initially, the Court would again observe, as it did when it denied Mr. Munoz's Motion for a Judgment of Acquittal pursuant to Fed R. Crim. P. 29, that "[t]he critical disputed fact at trial was whether Defendant Munoz knew that a package which he admitted to placing in interstate commerce contained methamphetamine. This disputed fact was the subject of extensive contradictory testimony, principally by Government witness Jose Tagaban and Defendant Munoz himself." (Memorandum and Order, Court Doc. 93, p.4).

The testimony at trial given by Mssrs. Munoz and Tagaban was irreconcilably inconsistent as to whether Mr. Munoz had knowledge of the contents of the FedEx package. As it previously observed at the hearing on the instant motion, the Court found Mr. Munoz's trial testimony in his own defense to be both credible and compelling. (*See* Transcript of June 21, 2007 evidentiary hearing, p. 123, ll.14-16, "after hearing the testimony at the trial from Mr. Munoz who I thought did a great job on the stand for himself . . . "). Similarly, it found Mr. Tagaban's trial testimony regarding the events which transpired in the cab of his employer's truck on July 20, 2006 to be credible.

The introduction of extrinsic evidence of reliability – including, but not limited to, character witnesses – is a tried and true method of forensic persuasion. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) (a defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged."); *United States v. Cylkouski,* 556 F.2d 799, 802 (6th Cir. 1977) (noting that a defendant may call witnesses for the sole purpose of testifying as to his general good character). Given that the testimony of both Messrs. Tagaban and Munoz appeared to the Court to be credible, and the irreconcilable nature of their testimony as to the crucial issue in this case, any extrinsic evidence regarding the relative credibility of Messrs. Tagaban and Munoz would have been particularly

compelling to the trier of fact. *See United States v. Cox,* 159 F. App'x 654, 657 (6th Cir. 2005) (noting that extrinsic evidence was "particularly probative of the credibility issue" when the defendant's knowledge was the main contested fact at trial). "The testimony of character witnesses . . . assume[s] a position of even greater importance than would be true in the ordinary case" when the defendant testifies and his credibility, weighed against that of the key prosecution witness, is the key dispute of fact in the case. *United States v. Polsinelli,* 649 F.2d 793, 198 (10th Cir. 1981). Accordingly, in this case, had either party been able to tip the balance of such a contest of credibility in favor of their side, they would very likely have prevailed in the case.[5] *See Velarde v.*

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[5] The Court notes the Government's argument that the testimony of Tennessee Bureau of Investigation (hereinafter "TBI") Narcotics Investigator Heath Frizzell and TBI Special Agent Mark Delaney regarding the statements made by Mr. Munoz while in custody at the offices of the U. S. Drug Enforcement Agency in Imperial, California shortly after his arrest on the evening of July 27, 2006 provides such extrinsic corroborative evidence of the reliability of Mr. Tagaban's version of events. As the Court suggested at the June 21, 2007 hearing (Transcript of June 21, 2007 evidentiary hearing, p. 123, ll. 11-17), however, and after hearing the trial testimony of Messrs. Frizzell, Delaney and Munoz, the Court is of the opinion that the TBI Agents' interpretation of Mr. Munoz's statements in response to their questions could have easily been in error. In any event, and for purposes of the instant motion, the Government's reliance on the testimony of Agents Frizzell and Delaney serves only to reinforce the Court's conviction that Mr. Munoz's counsel's failure to conduct a proper investigation of possible extrinsic evidence to corroborate Mr. Munoz's testimony

(Continued on following page)

Shulsen, 757 F.2d 1093, 1095 (10th Cir. 1985) (noting that where the case "comes down to a one-on-one situation, *i.e.*, the word of the defendant against the word of the key prosecution witness" the defendant's credibility is [sic] takes on great significance).

For this reason, the Court finds that there is a reasonable probability that Mr. Munoz's counsel's insufficient performance affected the outcome of the case. Accordingly, the Court finds that on the instant motion, Mr. Munoz has borne his burden of establishing the second, or so-called "prejudice" prong of the *Strickland* test.

IV. CONCLUSION

For the reasons explained above, Mr. Munoz's Motion for a New Trial [Court Doc. 133] is **GRANTED**. The Jury's Verdict [Court Doc. 77] is **SET ASIDE**. The Court **ORDERS** that a new trial of Mr. Munoz commence within the time frame established by 18 U.S.C. § 3161(e).

The Court will hold a scheduling conference for the purpose of establishing deadlines for the retrial on **Tuesday, March 10, 2009 at 3:00 p.m. EDT**. Defense counsel may participate by telephone.

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substantially prejudiced Mr. Munoz's chances for a verdict of not guilty.

SO ORDERED this 2nd day of March, 2009.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES
DISTRICT JUDGE

No. 09-5357

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellant,	)	ORDER
v.	)	(Filed Aug. 27, 2010)
RICHARD MUNOZ,	)	
Defendant-Appellee.	)	

BEFORE: BOGGS and NORRIS, Circuit Judges; and ADAMS,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. John R. Adams, United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1999 SESSION

MICHAEL LEE MCCORMICK,	)	**C.C.A. No. 03C01-9802-CR-00052**
Appellee,	)	**Hamilton County**
vs.	)	**Honorable John K. Byers, Sitting by Designation**
STATE OF TENNESSEE,	)	**(Post-Conviction – First Degree Murder – Death Penalty)**
Appellant.	)	

* * *

OPINION FILED: June 17, 1999

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The State of Tennessee appeals the Hamilton County Criminal Court's grant of post-conviction relief to the petitioner, Michael Lee McCormick. In 1987, a Hamilton County jury convicted the petitioner of the 1985 first degree murder of Donna Jean Nichols. The jury imposed the death penalty based upon its finding that the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant. *See* Tenn. Code Ann. §39-2-203(I)(6) (1982) (repealed

1989). The conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. McCormick,* 778 S.W.2d 48 (Tenn. 1989). On May 20, 1990, the petitioner filed the petition for post-conviction relief presently under review. After an evidentiary hearing, the post-conviction court ordered a new trial based upon its findings that the petitioner had received ineffective assistance of counsel in both the guilt and penalty phases of the trial. On appeal, the state raises the following issues:

> 1. Whether the lower court erred in finding that trial counsel inadequately investigated potential witnesses and that any such inadequacy prejudiced the defendant.
>
> 2. Whether the lower court erred in finding that the defendant received ineffective assistance of counsel at the sentencing phase of the trial and that any such ineffective assistance prejudiced the petitioner.
>
> 3. Whether some of the claims of the petitioner have been waived.

After oral argument of the issues, review of the parties' briefs and the law, and review of the record, we affirm the action of the post-conviction court.

I. Facts of the Murder Case.

The facts of the murder case are set forth in the following excerpt from the Supreme Court's direct-appeal opinion:

At about 2:00 a.m. Thursday, February 14, 1985, the body of the victim was discovered in a parking area along Brainerd Road in Chattanooga.

. . .

Two head wounds were apparent, as well as one on the hand.

. . .

An autopsy later that morning showed that Jeanie Nichols had been shot at very close range.

. . .

At 4:46 a.m. the [victim's] car was found in an auto service parking lot that was frequently used by customers of the adjacent Beach Club, a singles' night spot.

. . .

Faint smudges of blood stained the covers of the front seats, and a thick film of blood covered the frame and exterior panel below the passenger door.

. . .

The victim was at home until approximately 9:30 on the night of the 13th. At 9:45 she met a man she dated frequently, [Dewayne Hines,] and they had drinks at Merv's restaurant. When they separated at 11:30, Jeanie Nichols was driving the car later found near the Beach Club. She

announced she was going to "hit" Brainerd Road, by which her companion understood she planned to visit various night spots in the area.

* * *

II. Facts of the Post-Conviction Hearing.

a.

At the post-conviction hearing, Rodney Strong, one of the petitioner's trial attorneys, testified that he had practiced law since 1978 and had participated in several murder trials and four or five capital cases by the time of the petitioner's trial. Strong and his co-counsel, Paul Bergmann, investigated the case themselves by obtaining personal history from the defendant and by interviewing a number of witnesses. They did not petition the court for state funds to compensate an investigator or for expert services. Counsel determined that there was no need for expert psychological testimony after becoming acquainted with the petitioner and discussing the petitioner's case with Ken Stallings, a mental health counselor who had counseled the defendant for a substance abuse problem.

Counsel's bill for compensation reflected that Strong spent 22.8 hours investigating the case. Counsel filed a motion to suppress the defendant's pre-trial statements. Once the trial court overruled the motion to suppress the undercover tapes made by Cooper, the defense strategy was to show that the defendant's statements to Cooper that he had killed the victim

were manifestations of his propensity to lie about his deeds and experiences. The defense relied upon the lack of physical evidence that tied the defendant to the murder and upon the defendant's mother's testimony that the defendant was home at the time the crime was committed.

At trial, the defense tried to show that the petitioner had a reputation for lying and was known to claim falsely that he had fought in the war in Vietnam. The defense also relied upon the petitioner's history of being dependent on alcohol to support the claim that the inculpative statements given to the undercover agent were made merely to curry favor with the agent, who was providing a temporary residence for the petitioner.

One of the state's witnesses at the trial of the case, Donna Lawson, testified that prior to the night the victim was killed, she had seen the victim and the petitioner conversing three times. Twice Lawson saw the two talking in the Revco store where Lawson and the victim worked, and the week before the shooting, she saw them talking in a night club. In his post-conviction hearing testimony, Strong acknowledged that Lawson had been a former client of his and that, based upon this representation, he knew she had previously pleaded guilty to felony bad check charges. At trial, counsel declined to use the prior admission or convictions to impeach Lawson's testimony.

Strong testified that he tried to develop proof at trial to suggest that a boyfriend of the victim, David

Shore, was a jealous individual and that at the time of her death, the victim was dating another man, Dewayne Hines. The victim and Hines had been seen together at an establishment called Merv's on the night of February 13, 1985.

Counsel did not investigate the whereabouts of Dewayne Hines after he left Merv's on February 13, nor did they investigate the whereabouts of David Shore that night. Counsel did not talk to any of the employees of the Brainerd Beach Club nor check charge slips to ascertain identities of customers that were served at the Brainerd Beach Club on the night of February 13 or early morning hours of February 14.

The only physical evidence which the prosecution used in the trial was a hair found in the victim's automobile which contained properties similar to a strand of the petitioner's hair. The defense did not attempt to obtain independent analysis of the hair, nor did it attempt to obtain independent analysis of the clothes worn by the petitioner on the night of February 13-14. The defense did not attempt to obtain the victim's fingernail scrapings once the prosecutor informed counsel that the tests on the scrapings were "negative." Through the pre-trial statement of the petitioner's that was taken by Officer Dudley prior to the undercover operation, the trial evidence showed that the defendant admitted to drug and alcohol use and to various criminal convictions, including indecent exposure. Defense counsel did not object to these portions of the statement being

admitted into evidence because they wished to demonstrate the petitioner's problem with alcohol and that he had persisted in denying his involvement in the victim's murder despite the withering interrogative tactics of Dudley.

Defense counsel was aware prior to trial that Jeff Bowen, a security guard at the Brainerd Beach Club, saw a "girl who looked like Nichols and was dressed like Nichols leave with an unidentified male." Counsel elected not to pursue this information and did not call Bowen to testify at trial. Counsel had no recollection of a composite drawing of the man who Bowen saw leave the club with the victim on the night of February 13-14, although Bowen's statement and a copy of the drawing apparently were given to defense counsel during discovery. Strong opined, upon seeing the composite drawing for the first time at the post-conviction hearing, that had the figure in the drawing been given a beard, it would have resembled the petitioner's likeness. Strong recounted his belief that had the jury concluded the man meeting Bowen's description was the petitioner, then Bowen's testimony would be the only trial testimony to put the petitioner in the victim's presence on the night of her death.

* * *

Paul Bergmann, Strong's co-counsel, did not recall much of counsel's trial preparation activities. He testified that counsel either talked or attempted to talk to all of the witnesses whose names had been

given them by the defendant and his family and all of the witnesses named on the state's witness lists. Bergmann spent a total of 42.1 hours investigating the case and interviewing witnesses. He did not recall that either himself or Strong had interviewed Jeff Bowen. Specifically, he did not recall interviewing Jeff Bowen, reading Bowen's statement given to the police, or previously seeing the composite drawing made from Bowen's description of the man who allegedly accompanied the victim as she left the Brainerd Beach Club. Bergmann acknowledged that the petitioner had a full beard at the time of the homicide, whereas the figure in the Bowen drawing was clean-shaven except for a mustache.

* * *

c.

At the post-conviction hearing, the petitioner called William L. Curtis, a private investigator who had formerly served as an FBI special agent. Curtis conducted an investigation of the homicide as part of the petitioner's preparation for his post-conviction hearing, and in the course of the investigation, Curtis interviewed a number of persons.

* * *

None of the potential witnesses identified above [by Curtis] had been interviewed by defense counsel prior to the trial.

* * *

h.

The petitioner testified at the hearing that he had submitted a long list of names of possible witnesses to counsel, but only his parents and Ralph Lindsay testified for the defense at trial. He complained that prior to trial he had difficulty contacting his attorneys from the jail. He did not know that he could have petitioned for state funds for expert and investigator assistance until he began his post-conviction proceeding. He only met with Ken Stallings one time. He was not aware of Jeff Bowen prior to trial. He acknowledged that he elected not to testify at the trial. He maintained that he did not know the trial would consist of two phases, nor that he had a right to testify at the penalty phase even if he had not testified during the guilt phase.

* * *

III. Post-conviction Court's Findings.

Based upon the evidence, much of which is summarized above, the post-conviction court sustained the petition in the following particulars:

> 1. Counsel's representation was prejudicially deficient in failing to develop and use the information supplied by Jeff Bowen, including the composite drawing. The post-conviction court found that the Bowen evidence "would have been highly beneficial to the defense theory," especially "where the case contained little to no physical evidence against the defendant."

2. Counsel's investigation was prejudicially deficient in the failure to interview other employees from the Brainard Beach Club and other witnesses "who may have seen the victim on the night of the murder with someone other than the defendant."

3. Counsel was deficient in failing to develop mitigation evidence from lay witnesses for use at the sentencing hearing.

4. Although standing alone, the failure to use psychological evidence to explain the defendant's propensity to lie in the guilt phase would have been innocuous, the post-conviction court found that "in combination with all the other deficiencies in this case such an error has much greater weight" and that "the absence of a psychological expert at the sentencing phase is a more obvious deficiency because a psychological expert could have helped to more fully explain the defendant's tendencies to lie and his propensity to be influenced by alcohol and/or drugs."

5. Counsel was deficient in failing to impeach the testimony of Donna Lawson, the only trial witness to place the petitioner in the victim's company at any time.

6. Counsel failed to "focus the jury's attention on several inconsistencies between the defendant's statements and the facts of the state's case." Particularly glaring was the failure to emphasize the amount of time that passed between the victim's discovery of the petitioner's act of burglary and her murder,

> because this factor served as the sole basis for imposing the death penalty.
>
> 7. Counsel was deficient in failing to object to improper comments by the prosecution during the trial and during argument, which failures "contribute to the overall finding that the defendant did not receive the effective assistance of counsel and that this case was prejudiced by counsel's performance."

* * *

To summarize our treatment of the state's first issue, we hold that the state has failed to demonstrate that the evidence preponderates against the trial court's findings that trial counsel deficiently represented the petitioner, to the point of prejudice, in failing to use the Bowen evidence, in failing to discover the potential testimony of Jane McDonald, and in failing to impeach the testimony of Donna Lawson. Thus, the record supports the conclusion that the petitioner received ineffective assistance of counsel during the guilt phase of his trial.

In evaluating the prejudicial impact of counsel's deficient performance, we have considered the weight of the case against the petitioner, *see Strickland,* 466 U.S. at 695, 104 S. Ct. at 2069, and we are aware that, usually, prosecution evidence which includes a confession of the accused amounts to a strong case. However, the confession utilized here was not of the usual variety. It was not solemnized by a formal, official interrogation process. There was no waiver of

constitutional rights and no overt recording of the confession. In the casual, perhaps manipulative, setting in which the confession was elicited, the petitioner's mendacious propensities only sharpen the realization that this confession was vulnerable to attack. It did not pose an insurmountable barrier to finding prejudice from deficient performance of counsel, especially when the deficiency hampered the effort to impugn the confession. In this vein, evidence that would have bolstered the petitioner's claim of alibi was found by the post-conviction court to be significant to the theory of the defense. Accordingly, there was no error in ordering a new trial.

* * *

Conclusion.

* * *

The judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR.,
JUDGE

CONCUR:

GARY R. WADE, PRESIDING
JUDGE

NORMA McGEE OGLE,
JUDGE